Supreme Court, U.S.
FILED

No. 09-636 NOV 24 2009

OFFICE OF THE CLERK

In The
Supreme Court of the United States

SAMUEL SHABAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

LISA L. THARPE
Counsel of Record
FOLEY & LARDNER LLP
321 North Clark Street,
Suite 2800
Chicago, Illinois 60654-5313
(312) 832-4500

ROBERT C. LEVENTHAL
FOLEY & LARDNER LLP
555 South Flower Street,
Suite 3500
Los Angeles, California
90071-2411
(213) 972-4500
(213) 486-0065

Counsel for Petitioner
Samuel Shabaz

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

This case presents the Court with the opportunity of resolving a split among the circuits regarding the correct interpretation of *Davis v. United States* regarding a suspect's invocation and waiver of his right to counsel. Specifically, the split focuses on the question of whether the "unambiguous and unequivocal request" rule, as announced by the Court in *Davis,* applies in both pre-waiver and post-waiver settings thereby eliminating the government's heavy burden of proving that a waiver has occurred, as interpreted by the Third, Fourth, Fifth, Sixth, and Tenth Circuits, or applies only in post-waiver or re-invocation settings, after the heavy burden has been met, as interpreted by the Second and Ninth Circuits.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
I. THE SEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE RULINGS OF OTHER CIRCUITS WHICH HAVE CONSIDERED THE ISSUE OF WHETHER THE *DAVIS* RULE APPLIES IN PRE-WAIVER SETTINGS	4
II. THE SEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH *MIRANDA* AND ITS PROGENY AND REFLECTS A MISAPPLICATION OF THIS COURT'S NARROW HOLDING IN *DAVIS*	11
CONCLUSION	15

APPENDIX

United States v. Shabaz, 579 F.3d 815 (7th Cir. 2009)	App. 1
United States v. Shabaz, 2008 WL 4874113 (N.D. Ill. June 2, 2008)	App. 12

TABLE OF CONTENTS – Continued

Page

Relevant Portions of Transcripts of Proceedings Before the Honorable Sidney I. Shenkier, Magistrate Judge (April 11, 2008).....App. 31

Relevant Portions of Transcripts of Proceedings – Suppression Hearing, Before the Honorable Sidney I. Shenkier, Magistrate Judge (March 31, 2008) .....App. 61

Relevant Portions of Transcripts of Proceedings – Continued Suppression Hearing, Before the Honorable Sidney I. Shenkier, Magistrate Judge (April 1, 2008) .....App. 69

Relevant Portions of Transcripts of Proceedings – Continued Suppression Hearing, Before the Honorable Sidney I. Shenkier, Magistrate Judge (April 3, 2008) .....App. 73

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) 7, 9

Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) ..... *passim*

Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) 8, 10, 11, 12, 15

Grant-Chase v. Comm'r, New Hampshire Dep't of Corr., 145 F.3d 431 (1st Cir. 1998) 5

Miranda v. State of Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) ..... *passim*

Montejo v. Louisiana, ___ U.S. ___, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) 7

Smith v. Illinois, 469 U.S. 91, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984) 8, 11, 13, 15

United States v. Brown, 287 F.3d 965 (10th Cir. 2002) 5

United States v. Johnson, 400 F.3d 187 (4th Cir. 2005) 5

United States v. Lee, 413 F.3d 622 (7th Cir. 2005) 5

United States v. Plugh, 576 F.3d 135 (2nd Cir. 2009) ..... *passim*

United States v. Posada-Rios, 158 F.3d 832 (5th Cir. 1998) 5

TABLE OF AUTHORITIES – Continued

Page

United States v. Rodriguez, 518 F.3d 1072 (9th Cir. 2008) 5, 6, 10, 11, 13

United States v. Suarez, 263 F.3d 468 (6th Cir. 2001) 5

United States v. Syslo, 303 F.3d 860 (8th Cir. 2002) 5

United States of America v. Shabaz, 579 F.3d 815 (7th Cir. 2009) 1

STATE CASES

In re Christopher K., 841 N.E.2d 945 (Ill. 2005) 6

State v. Holloway, 760 A.2d 223 (Me. 2000) 6

State v. Leyva, 951 P.2d 738 (Utah 1997) 6

State v. Tuttle, 650 N.W.2d 20 (S.D. 2002) 6

FEDERAL STATUTES

18 U.S.C. § 2113(a) 2

28 U.S.C. § 1254(1) 1

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 2, 5, 6, 8

PETITION FOR A WRIT OF CERTIORARI

Petitioner Samuel Shabaz ("Mr. Shabaz"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of United States District Court for the Northern District of Illinois that denied Shabaz's Motion to Suppress Statements and Evidence ("Motion").

OPINIONS BELOW

The opinion of the Seventh Circuit (App. 1-11), is reported at *Shabaz v. United States of America*, 579 F.3d 815 (7th Cir. 2009). The opinion of the District Court denying the Motion (App. 12-30), has not been published.

JURISDICTION

The judgment of the Seventh Circuit was entered on August 27, 2009. There were no petitions for rehearing. This petition is timely filed within 90 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment Five provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

STATEMENT OF THE CASE

On December 21, 2007, Mr. Shabaz was arrested at his house and driven to the Calumet City police station for interrogation on the suspicion that he had committed an armed robbery of a federally insured bank in violation of 18 U.S.C. § 2113(a). (App. 13) While waiting at the police station, prior to his interrogation, Mr. Shabaz asked FBI agent Watson, "***Am I going to be able to get an attorney?***" (App. 5, 18, 40) Agent Watson ignored Mr. Shabaz's request for counsel and directed Mr. Shabaz to the interrogation

room where he remained handcuffed. (App. 5, 18, 24, 25, 39-40, 66) Agent Watson explained to Mr. Shabaz the reasons for his arrest, and then provided Mr. Shabaz with an advice of rights form, which asked him to agree in writing to waive his rights. (App. 2-3, 18-19, 43-44, 47-49) Mr. Shabaz acknowledged that he understood his rights, but refused to sign the waiver of rights form. *Id.*

Following Mr. Shabaz's request for counsel and refusal to sign a waiver of *Miranda* rights form, Mr. Shabaz was subjected to questioning by law enforcement officers. (App. 5, 18-19, 23-25, 43-49) As a result of this questioning, Mr. Shabaz eventually made inculpatory statements and signed a consent to search form. (App. 3-4, 19, 49-50)

Mr. Shabaz moved to suppress evidence of his inculpatory statements and evidence obtained from the search on the grounds that he had been deprived of his *Miranda* rights because his request for counsel had been ignored. (App. 4, 12-13, 33) The suppression motion was heard by a Magistrate Judge who held an evidentiary hearing. (App. 4, 12-13, 31-75) The Magistrate Judge ultimately concluded that the government had met its burden of establishing that Mr. Shabaz had knowingly and voluntarily waived his *Miranda* rights and denied the motion to suppress. (App. 4-5, 17-19, 31-34)

Mr. Shabaz filed objections to the Magistrate Judge's Report and Recommendations with the District Court. (App. 5, 20) The District Court overruled

the objections, finding that Agent Watson's failure to respond to Mr. Shabaz's request for an attorney did not deny him his right to counsel, it merely "deferred" the question. (App. 5, 25, 40) The District Court then adopted the Magistrate Judge's Report and Recommendation and denied the motion to suppress. (App. 5, 29-30)

On October 29, 2008, Mr. Shabaz appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit"). Oral argument was held on June 4, 2009. (App. 1) On August 27, 2009, the Seventh Circuit issued an opinion affirming the District Court's decision. (App. 1-11) In affirming the District Court's decision, the Seventh Circuit found that Mr. Shabaz's question was not a clear and unambiguous request for counsel sufficient for the right to counsel to attach. (App. 8-9)

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's Decision Is Inconsistent With The Rulings Of Other Circuits Which Have Considered The Issue Of Whether The *Davis* Rule Applies In Pre-Waiver Settings.

This case presents an opportunity for the Court to resolve a Circuit split on a critical issue. Specifically, the Seventh Circuit's decision in this case is inconsistent with the Second and Ninth Circuit decisions in *United States v. Plugh*, 576 F.3d 135 (2nd

Cir. 2009) and *United States v. Rodriguez*, 518 F.3d 1072 (9th Cir. 2008), respectively. It is also contrary to this Court's holding in *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), which the Second and Ninth Circuits properly followed. In particular, the Second and Ninth Circuits correctly interpreted *Davis* as requiring that a suspect demonstrate an unambiguous and unequivocal invocation of his Fifth Amendment rights only where that suspect already has waived those rights and thereafter attempts to invoke them. *Plugh*, 576 F.3d at 142; *Rodriguez*, 518 F.3d at 1078-79. Other Circuits similarly have misapplied *Davis* to pre-waiver interrogation situations. These Circuits include the Third, Fourth, Fifth, Sixth, and Tenth Circuits.[1] However, we are aware of no case in which any circuit court has actually examined or considered the issue of whether *Davis* should be applied to both pre-and post-waiver settings.[2]

---

[1] *See, e.g., United States v. Johnson*, 400 F.3d 187, 194-95 (4th Cir. 2005) (applying *Davis* to a pre-waiver statement); *United States v. Lee*, 413 F.3d 622, 626 (7th Cir. 2005) (same); *United States v. Brown*, 287 F.3d 965, 972-73 (10th Cir. 2002) (same); *United States v. Syslo*, 303 F.3d 860, 866 (8th Cir. 2002) (same); *United States v. Suarez*, 263 F.3d 468, 482-83 (6th Cir. 2001) (same); *Grant-Chase v. Comm'r, New Hampshire Dep't of Corr.*, 145 F.3d 431, 436 & n. 5 (1st Cir. 1998) (same); *United States v. Posada-Rios*, 158 F.3d 832, 867 (5th Cir. 1998) (same).

[2] While no other Circuit Courts have examined the issue of whether *Davis* should be applied only in post-waiver settings, a majority of state supreme courts to consider the issue have held that the "unambiguous or unequivocal request" rule of *Davis* is

(Continued on following page)

The court has a long history of honoring a suspect's Fifth Amendment rights, including several prophylactic rules which custodial officers must obey once the suspect is in custody. This Court's decision in *Miranda* stands for the proposition that, simply because a suspect was properly advised of his rights does not lead to the inevitable conclusion that any subsequent statements were obtained without violating those rights. Specifically, this Court found that the "heavy burden" is on the government to demonstrate that a suspect has waived his right to remain silent:

---

limited to post-waiver scenarios. *Rodriguez*, 518 F.3d at 1079 n. 6 (citing cases: *State v. Tuttle*, 650 N.W.2d 20, 28 (S.D. 2002) ("*Davis*, in sum, applies to an equivocal postwaiver invocation of rights. For an initial waiver, however, the State still bears 'a heavy burden to demonstrate that the defendant knowingly and intelligently waived' *Miranda* rights." (quoting *Miranda*, 384 U.S. at 475, 86 S. Ct. 1602, 1628)); *State v. Holloway*, 760 A.2d 223, 228 (Me. 2000) (declining "to require an unambiguous invocation of the right to remain silent and the right to an attorney in the absence of a prior waiver"); *State v. Leyva*, 951 P.2d 738, 743 (Utah 1997) ("The Court in *Davis* made clear that its holding applied only to a suspect's attempt to reinvoke his *Miranda* rights 'after a knowing and voluntary waiver' of the same. . . . Plainly, [it] did not intend its holding to extend to prewaiver scenarios, and we see no reason to so extend it." (quoting *Davis*, 512 U.S. at 461, 114 S. Ct. 2350, 2356)); *cf. In re Christopher K.*, 217 Ill. 2d 348, 299 Ill. Dec. 213, 841 N.E.2d 945, 964-65 (2005) (noting that the U.S. Supreme Court has left open the issue of whether the objective *Davis* test applies in a prewaiver setting and applying the "clear statement" rule of *Davis* in an initial waiver situation).

> If the individual indicates *in any manner*, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease.
>
> * * *
>
> If the interrogation continues without the presence of an attorney and a statement is taken, a *heavy burden rests on the government* to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retain or appoint counsel.

Miranda v. State of Arizona, 384 U.S. 436, 473, 86 S. Ct. 1602, 1628, 16 L. Ed. 2d 694 (1966) (emphasis supplied). *See also Montejo v. Louisiana*, ___ U.S. ___, 129 S. Ct. 2079, 2089, 173 L. Ed. 2d 955 (2009) ("under *Miranda's* prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right."). Indeed, "courts must presume that a defendant *did not* waive his rights until the government proves otherwise by a preponderance of the evidence" *Colorado v. Connelly*, 479 U.S. 157, 169, 107 S. Ct. 515, 522, 93 L. Ed. 2d 473 (1986) (internal citations omitted) (emphasis supplied). In other words, unless the government can prove by a preponderance of the evidence that a suspect waived his or her rights, courts must presume that the suspect retained them.

The Court further fleshed out the mechanisms for ensuring the viability of these constitutional protections in *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). There, the Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by a showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 U.S. at 484, 101 S. Ct. at 1884-85. The Court later cautioned that "[i]nvocation and waiver [of *Miranda* rights] are entirely distinct inquiries, and the two must not be blurred by merging them together." *Smith v. Illinois*, 469 U.S. 91, 98, 105 S. Ct. 490, 449, 83 L. Ed. 2d 488 (1984).

The *Davis* Court applied an additional layer to the invocation analysis, holding that, if a suspect initially waives his or her Fifth Amendment rights and *thereafter* attempts to invoke those rights, the suspect bears the burden of showing that the invocation was sufficiently unambiguous and unequivocal to trigger the prophylaxis rules. *Plugh*, 576 F.3d at 142 (citing *Davis*, 512 U.S. at 460-62, 114 S. Ct. 2350, 2355-57).

Certain Circuit Courts have interpreted *Davis* as requiring that a suspect's initial invocation of his right to counsel be unambiguous, and that the ambiguity is resolved *against the suspect. See supra* at n. 1. This interpretation effectively shifts much of the government's "heavy burden" of establishing that a

suspect waived his rights from the government to the suspect. Such a view reflects a serious misinterpretation of *Davis*.

The Second and Ninth Circuits, properly limited the *Davis* holding to post-waiver situations. In *Plugh*, the Second Circuit affirmed a district court's decision to suppress the defendant's statements, finding that the defendant properly invoked his right to counsel by stating, "I am not sure if I should be talking to you," and "I don't know if I need a lawyer," and by refusing to sign a waiver of rights form. *Plugh,* 576 F.3d at 142. In affirming, the Second Circuit declined to apply the holding in *Davis* that an invocation of the right to counsel be unambiguous where that invocation occurs before the suspect has waived his *Miranda* rights. *Id.* at 142-43. The *Plugh* court found that there is no instruction in *Davis* regarding how courts should analyze an initial invocation of one's right to counsel where no waiver occurred. *Id.* (finding that "*Davis* only provides guidance for circumstances in which a defendant makes a claim that he subsequently invoked previously waived Fifth Amendment rights."). The court noted that the burden is on the government to prove that a suspect has waived his rights in order to use any statements made by the suspect without counsel present. *Id.* at 143 (citing *Connelly*, 479 U.S. at 169, 107 S. Ct. at 522, 93 L. Ed. 2d 473). If the government meets this burden, "the suspect has the burden of proving that he resurrected rights previously waived." *Id.* It is under this circumstance that *Davis* requires the

invocation to be unambiguous and unequivocal. *Id.* Indeed, the *Davis* Court was careful to note that, only "after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Davis*, 512 U.S. at 461, 114 S. Ct. at 2356. The *Plugh* court pointed to numerous statements by the *Davis* Court to support its limited application of the holding. *Plugh*, 576 F.3d at 143 (quoting *Davis* at 459, 114 S. Ct. at 2355 (noting that an ambiguous reference to an attorney would not compel the "*cessation* of questioning") (emphasis added); *id.* (noting that a "statement [that] fails to meet the requisite level of clarity . . . does not require that the officers *stop* questioning the suspect") (emphasis added); *id.* (declining to extend *Edwards* to require officers to "*cease* questioning" upon an equivocal statement by a suspect) (emphasis added)).

The Ninth Circuit likewise found that the holding of *Davis* was narrowly addressed to the facts of the case: "We therefore hold that, *after a knowing and voluntary waiver of the* Miranda *rights,* law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Rodriguez*, 518 F.3d 1072, 1078 (quoting *Davis*, at 461, 114 S. Ct. 2350). The court further noted that the *Davis* opinion "asks whether 'further questioning' is permitted upon an equivocal or ambiguous invocation of the right to counsel, or, rather, whether questioning must 'cease,' or 'stop,' – all implying that legal questioning, following a valid initial *Miranda* waiver,

was already occurring." *Id.* (citing *Davis* at 454, 458-62, 114 S. Ct. at 2351, 2354-57). The *Rodriguez* court also noted the *Smith* Court's caution against conflating the analysis of invocation and waiver of *Miranda* rights, noting that they are two distinct inquiries. *Id.* (citing *Smith v. Illinois,* 469 U.S. 91, 98, 105 S. Ct. 490, 494, 83 L. Ed. 2d 488 (1984)). As a result, the court found that *Davis* did not address what police must obtain in the initial waiver context to begin questioning; rather, *Davis* "addressed what the suspect must do to *restore* his *Miranda* rights after having already knowingly and voluntarily waived them." *Id.* at 1079 (emphasis supplied).

II. The Seventh Circuit's Decision Is Inconsistent With *Miranda* And Its Progeny And Reflects A Misapplication Of This Court's Narrow Holding In *Davis*.

Had the Seventh Circuit properly applied *Miranda* and its progeny, and properly limited the holding in *Davis* to post-waiver settings, Mr. Shabaz would have been successful in his appeal below. Specifically, Mr. Shabaz's statement, "Am I going to be able to get an attorney," satisfies *Miranda's* standard for indicating "in any manner" that he preferred to remain silent. Applying *Edwards,* Mr. Shabaz could not have effected a valid waiver of his right to have counsel present simply because he subsequently "responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards,* 451 U.S. at 484, 101 S. Ct. at 1884-85.

However, contrary to the holdings of *Miranda*, *Edwards,* and their progeny, the Seventh Circuit did not recognize the presumption that Mr. Shabaz had not waived his rights. The court further did not require the government to meet its "heavy burden" of demonstrating that Mr. Shabaz knowingly and intelligently waived his rights. On the contrary, the Seventh Circuit impermissibly blurred together its analysis of invocation and waiver of Mr. Shabaz's *Miranda* rights. (App. 7-9) In particular, the Seventh Circuit erroneously applied *Davis* in this pre-waiver context, finding that Mr. Shabaz's statement was not an unambiguous invocation of his right to counsel. Moreover, the Seventh Circuit found that, even when Mr. Shabaz later was read his *Miranda* rights and refused to sign the proffered waiver form, his subsequent submission to police-initiated custodial interrogation constituted evidence of waiver. (App. 9) In reaching this decision, the Seventh Circuit pointed to Mr. Shabaz's failure to "follow[] up on his initial question" about an attorney as further justification for the police to proceed with their interrogation of him. (App. 9) This analysis demonstrates that the Seventh Circuit effectively shifted the burden of proof from the government carrying its "heavy burden" of proving waiver to the suspect instead proving an unambiguous invocation. This analysis is impermissible in a pre-waiver context.

The interpretation of *Davis* offered by the Second and Ninth Circuits as limited to a post-waiver context are better reasoned and more consistent with this

Court's careful guarding of constitutional rights and presumption against waiver. As the *Miranda* court announced, "This Court has always set high standards of proof for the waiver of constitutional rights, and we reassert these standards as applied in custody interrogation." *Miranda,* 384 U.S. at 475, 86 S. Ct. 1602, 1628 (citation omitted). Therefore, as the *Rodriguez* court reasoned:

> Once the "heavy burden" has been met, however, *Davis* indicated that the benefits of *Miranda* have been realized: the suspect has understood his rights and has freely chosen to proceed. It is then the police's right to interrogate the suspect, and the suspect, in effect, who bears the "burden" of cutting off questioning by unambiguously retracting the clear waiver he has already given.

Rodriguez, 518 F.3d at 1079. While a majority of circuit courts have applied the *Davis* rule in a pre-waiver or initial waiver context, we are not aware of any circuit court that has done so following a similar consideration of the issue of whether the *Davis* rule is more appropriately interpreted as applying only to the post-waiver context. Specifically, the Seventh Circuit did not consider whether *Davis* should be limited to post-waiver settings and incorrectly conflated the analysis of invocation and waiver, contrary to this Court's holding in *Smith v. Illinois*. The Second and Ninth Circuits, on the other hand, offer a careful analysis of the narrow holding in *Davis* and the

consistency of the post-waiver interpretation with earlier precedent of this Court.

There is no factual dispute here. Mr. Shabaz made the statement, "Am I going to be able to get an attorney?" There is no dispute that he made this statement before submitting to any questions by the police. Further, there is no dispute that Mr. Shabaz was then led into an interrogation room, where he was read his *Miranda* rights and refused to sign a written waiver. There is no dispute that the police ignored Mr. Shabaz's request for an attorney and refusal to sign a waiver form, and instead began questioning him. The only evidence offered by the government to establish that Mr. Shabaz waived his rights was that he responded to questioning by the police during his interrogation.

Certainly, the government here did not meet its "heavy burden" of establishing that Mr. Shabaz made a knowing and intelligent waiver of his *Miranda* rights. However, the Seventh Circuit misapplied *Davis* to the pre-waiver setting at issue to find that Mr. Shabaz's request was not sufficiently unambiguous to invoke his right to counsel. If the Seventh Circuit had applied the well-reasoned analysis offered by the Second and Ninth Circuits limiting the *Davis* rule to post-waiver settings, there would have been no question that Mr. Shabaz properly invoked his right to counsel. Indeed, the facts in *Plugh* are on all fours. As in *Plugh,* Mr. Shabaz made a request for an attorney that was determined to be ambiguous. In *Plugh,* the suspect stated, "I am not sure if I should be talking to you," and "I don't know if I need a

lawyer." Here, Mr. Shabaz stated, "Am I going to be able to get an attorney." Both Mr. Shabaz and the suspect in *Plugh* refused to sign waiver forms after being read their *Miranda* rights. The Second Circuit refused to apply the *Davis* rule in this pre-waiver setting and found that the suspect had invoked his right to counsel. Given nearly identical facts, the Seventh Circuit applied *Davis* to a pre-waiver context, and found that Mr. Shabaz had not invoked his right to counsel. The better reasoned interpretation of the *Davis* rule offered by the Second and Ninth Circuits should have been applied in this case to exclude any statements by Mr. Shabaz following his request for counsel and refusal to sign the waiver form.

CONCLUSION

The Seventh Circuit has erroneously read *Davis* broadly as requiring an unambiguous invocation by a suspect of his right to counsel regardless of whether a suspect has not yet waived his *Miranda* rights. In doing so, the Seventh Circuit has departed from the reasoning offered by *Miranda* and its progeny which have imposed a "heavy burden" on the government to establish that a suspect has waived his constitutional rights. This Court's long history of precedent, starting with *Miranda*, *Edwards*, and *Smith v. Illinois,* clearly recognizes a presumption that a suspect has not waived his rights and that this presumption may be overcome only where the government meets its "heavy burden" to establish that a waiver has occurred. The *Davis* rule may be reconciled with this

precedent because it applies to post-waiver settings where a suspect already has indicated full comprehension of his rights and has made a knowing and voluntary waiver of his rights, thereby dispelling whatever coercion is inherent in the interrogation process. The same cannot be said of pre-waiver settings and, therefore, the presumption against waiver must apply unless and until the government can carry its "heavy burden" of proving waiver. Accordingly, Mr. Shabaz respectfully requests that this Court grant the writ of certiorari and hear this case on the merits.

DATED THIS 24TH DAY OF NOVEMBER, 2009.

Respectfully submitted,

LISA L. THARPE
Counsel of Record
FOLEY & LARDNER LLP
321 North Clark Street,
Suite 2800
Chicago, Illinois 60654-5313
(312) 832-4500

ROBERT C. LEVENTHAL
FOLEY & LARDNER LLP
555 South Flower Street,
Suite 3500
Los Angeles, California
90071-2411
(213) 972-4500
(213) 486-0065

Counsel for Petitioner
Samuel Shabaz

579 F.3d 815

United States Court of Appeals,
Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Samuel SHABAZ, Defendant-Appellant.
No. 08-3751.

Argued June 4, 2009.
Decided Aug. 27, 2009.

Nathalina Hudson (argued), Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

Robert C. Leventhal (argued), Foley & Lardner, Los Angeles, CA, for Defendant-Appellant.

Samuel Shabaz, Oklahoma City, OK, pro se.

Before FLAUM, WOOD and TINDER, Circuit Judges.

WOOD, Circuit Judge.

On December 21, 2007, Samuel Shabaz was arrested at his home in Chicago, Illinois, by agents of the Federal Bureau of Investigation. The FBI agents were acting under the authority of an arrest warrant that named Shabaz as a suspect in a robbery at a TCF Bank, which is located in Oak Lawn, Illinois. Following the arrest, the FBI agents, along with officers from the Oak Lawn Police Department, took Shabaz to the Calumet City Police Department. (Oak Lawn and Calumet City are both south suburbs of Chicago.) Once there, Shabaz confessed to his role in two bank robberies. In due course, a federal grand jury indicted him on one count of attempted bank

robbery and two counts of bank robbery, in violation of 18 U.S.C. § 2113(a). Shabaz moved to suppress his confession, asserting that it was taken in violation of his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). After the district court denied his motion, Shabaz entered a conditional plea of guilty, reserving the right to appeal the court's refusal to suppress the confession. We conclude that Shabaz cannot prevail unless we were to overturn key credibility rulings of the district court. Finding no reason to do so, we affirm.

I

Shabaz's appeal turns on what happened to him after he found himself at the Calumet City Police Department. The parties' accounts differ significantly. The Government presented evidence that once Shabaz arrived at the police station he asked to use, and was permitted to use, the bathroom. Agent Watson testified that before Shabaz was taken into the interview room, he heard Shabaz use the word "attorney" or "lawyer," although he did not remember the context in which the word was used. Agent Watson said that he was sure that Shabaz did not request an attorney. Once Shabaz was led into the interview room, Agent Watson made introductory remarks, identified who was there, explained to Shabaz why he had been arrested, and outlined the topics that the FBI wanted to discuss with him. Agent Watson then read Shabaz his *Miranda* rights and asked him to sign an "advice of rights" waiver form. Shabaz

stated that he understood his rights, but he refused to sign the form. Instead, he said that he would continue to speak to the FBI but would stop any time he felt he did not want to answer a question. The officers denied making any promises of lenience to him.

Shabaz told quite a different story. According to him, as soon as he had arrived at the police station and used the restroom, he asked Agent Watson, "[A]m I going to be able to get an attorney?" (In its brief, the Government appears to agree that Shabaz asked this question.) Agent Watson replied, "[L]et's just get you down here," pointing to an interview room. Shabaz testified that as he entered the interview room, Agent Watson said, "[W]e know what you've been doing," and asked him to "start at the beginning." Shabaz testified that he asked for a lawyer several times and was ignored. At some point, Shabaz asked to speak with two people: his girlfriend, Maritza Velazques, and his friend Kabir. The officers refused to let him do so until he agreed to cooperate. Shabaz asserted that they repeatedly told him that he would be treated with lenience if he cooperated. Shabaz stated that he stopped requesting an attorney because he believed that he would not be provided with one.

Both sides agree that the FBI agents presented Shabaz with a "consent to search" form, which he signed. The Government says that the form described Shabaz's house, two Dodge vans, and his cellular telephone. Shabaz, however, testified that the consent to search form did not list the places to be searched at the time that he signed it. There is additional

disagreement about when Shabaz was asked to sign the consent to search form and at what point the agents began seriously to question him. But once the questioning began, Shabaz confessed in detail to robbing the TCF Bank in Oak Lawn on two different occasions and once attempting to rob the Standard Bank and Trust, also in Oak Lawn. His confession included information about his planning and execution of the robberies, his motive, and his disposition of the money. He also identified himself in the bank surveillance photographs from each of the robberies, and he signed them to acknowledge that he was the man in them.

II

In the district court, Shabaz moved to suppress all of the incriminating statements he made during the interview, arguing that his question in the hallway about an attorney was an unambiguous request for counsel. When the agents persisted in interrogating him, he reasons, they violated his *Miranda* rights, and that violation renders all of his post-request statements inadmissible. Shabaz also argued that any waiver of his *Miranda* rights he might have made in the interview room was not knowing and voluntary.

The suppression motion was heard by a magistrate judge, who held an evidentiary hearing and recommended that the district court find that the Government had met its burden of showing by a

preponderance of the evidence that Shabaz had knowingly and voluntarily waived his *Miranda* rights before his confession. First, the magistrate judge found that the officers did not violate Shabaz's rights at the time of the arrest, because he was not questioned nor did he give statements at that time. Second, the judge credited Shabaz's testimony that he asked Agent Watson, "[A]m I going to be able to get an attorney?" prior to entering the interview room. The judge, however, did not interpret Agent Watson's response as an outright denial. Instead, the judge found, when Agent Watson responded by directing Shabaz to the interview room, the agent was merely deferring an answer to the question for a couple of minutes (during which no interrogation took place). At that point, the judge chose to credit the accounts of the Government's witnesses and to reject Shabaz's version. This led to the judge's finding that Shabaz knowingly and voluntarily waived his *Miranda* rights once he was in the interview room and he began to talk. On review, the district court accepted the magistrate judge's report and recommendation and denied the motion to suppress.

On appeal, Shabaz argues only that the district court erred when it denied his motion to suppress for two reasons: first, because the agents wrongfully denied his request for an attorney, and second, because any waiver of his *Miranda* rights that may have occurred was not knowing and voluntary.

III

Shabaz first argues that the district court erred in denying his motion to suppress because he unambiguously requested an attorney when he asked, "[A]m I going to be able to get an attorney?" Shabaz regards this statement as sufficient, as a matter of law, to invoke his *Miranda* rights. Central to *Miranda*'s holding is that law enforcement officers are obliged to inform an accused who is subject to custodial interrogation that she has the right to consult an attorney and to have an attorney present during questioning. *Miranda,* 384 U.S. at 471-72, 86 S.Ct. 1602; *Davis v. United States,* 512 U.S. 452, 457, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). If a suspect invokes her *Miranda* rights, she "is not subject to further interrogation by the authorities until counsel has been made available . . . unless the accused [herself] initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona,* 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

The key issue in this case is whether Shabaz clearly invoked his right to counsel. Whether an accused did so is an objective inquiry. If the suspect makes a reference to an attorney that is ambiguous "in that a reasonable officer in light of the circumstances would have understood that the suspect *might* be invoking the right to counsel," it is not necessary for the authorities to cut off questioning. *Davis,* 512 U.S. at 459, 114 S.Ct. 2350. Law enforcement officials are not under any obligation to clarify ambiguous statements made by an accused. *United*

States v. Muhammad, 120 F.3d 688, 698 (7th Cir.1997). The burden is instead on the suspect to make a "clear and unambiguous assertion of his right to counsel to stop questioning." *United States v. Lee,* 413 F.3d 622, 625 (7th Cir.2005). Nonetheless, if a suspect confesses after law enforcement officers have violated the requirements of *Miranda,* any inculpatory statement made by the suspect cannot be used against him at trial. *Id.*

Shabaz contends that the district court erred as a matter of law when it did not grant his motion to suppress because he clearly asked for an attorney before Agent Watson took him into the interview room. But this way of phrasing the question assumes the answer to the problem, which is whether the statement "am I going to be able to get an attorney?" was in fact an immediate request for counsel. Neither the magistrate judge nor the district court understood the question this way; they held instead that the question did not require an instant positive response and that Agent Watson simply deferred his answer until they were inside the room.

We agree with the district court that Shabaz's question was not a clear request for counsel under the circumstances. It falls short of other statements that we have characterized as unambiguous requests for counsel. Thus, in *Lord v. Duckworth* we mentioned a number of statements that we would consider an unequivocal and clear request for counsel, including: "I think I should call my lawyer"; "I have to get me a good lawyer, man. Can I make a phone call?"; and

"Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?" 29 F.3d 1216, 1221 (7th Cir.1994) (quoting cases from the Eleventh and Ninth Circuits regarding unambiguous invocation of the right to counsel). In *Lord,* in contrast, we decided that the defendant's statement "I can't afford a lawyer but is there anyway I can get one?" was not an unambiguous request for an attorney. *Id.* at 1220-21. The fact that Lord "did not pursue the matter any further" after his initial inquiry was an important factor in our determination. *Id.* at 1221. Similarly, in *United States v. Walker,* we held that the defendant's statement that "he wasn't sure whether he should talk to [the agent] because he was afraid it would piss his lawyer off" was not an unambiguous request for counsel where he later told police to "go ahead" with questioning. 272 F.3d 407, 413-14 (7th Cir.2001). That was also the case in *United States v. Buckley,* where the defendant said, "I don't know if I need an attorney," but was soon thereafter read his *Miranda* rights. 4 F.3d 552, 558-59 (7th Cir.1993). This was close to the statement that the Supreme Court evaluated in *Davis,* where it held that saying "maybe I should talk to a lawyer" was not sufficiently clear to alert a reasonable police officer that the defendant was requesting an attorney. 512 U.S. at 455, 458-62, 114 S.Ct. 2350.

A common point among the statements that have been deemed insufficient is that they do not clearly imply "a present desire to consult with counsel. . . ."

Lord, 29 F.3d at 1221. Shabaz's question is the same. The words "am I *going to be able* to get an attorney?" did not unambiguously indicate to Agent Watson that Shabaz was right then asking for an attorney. But our analysis does not end with words alone; as in our previous cases, we also consider the circumstances in which the statement was made. The remainder of Shabaz's encounter with the agents supports our conclusion that he did not unambiguously request counsel. As soon as Shabaz was led into the interview room, he was read his *Miranda* rights and, at that point, he easily could have requested an attorney. Although he says that he in fact did so, the district court did not believe his account; instead, the court credited the FBI agents and the Oak Lawn police and found that he made no such request. That is the kind of credibility finding to which we defer. *Walker,* 272 F.3d at 414. On the record as it comes to us, therefore, Shabaz did not clearly request an attorney. After he was properly informed of his rights, he chose instead to talk to his interrogators and never followed up on his initial question in the hall. Under those circumstances, the officers were under no obligation to stop questioning Shabaz, and the district court properly denied his motion to suppress.

Shabaz's alternate claim is that even if his statement was not a clear and unambiguous request for an attorney, the district court erred in denying his motion to suppress his post-arrest statements because he did not knowingly and voluntarily waive his *Miranda* rights. We consider *de novo* whether

Shabaz's *Miranda* waiver was knowing and voluntary, *United States v. Jackson,* 300 F.3d 740, 747-48 (7th Cir.2002), but we review the district court's findings of fact and credibility determinations under the clear error standard, *Walker,* 272 F.3d at 411-12. Where a defendant makes a post-arrest statement, the Government bears the burden of proving that the statement was made following a voluntary, knowing, and intelligent waiver, *Miranda,* 384 U.S. at 475, 86 S.Ct. 1602, taking into account the totality of the circumstances, *Jackson,* 300 F.3d at 748. In making this determination, we look at factors such as the defendant's background and conduct, the duration and conditions of the interview and detention, the physical and mental condition of the defendant, the attitude of the law enforcement officials, and whether law enforcement officers used coercive techniques, either psychological or physical. *Id.*

At the suppression hearing, the magistrate judge heard testimony from Shabaz and at least five government witnesses. We have reviewed those accounts already. The magistrate judge made a credibility determination that despite Shabaz's failure to sign the waiver form, he was advised of his *Miranda* rights and voluntarily agreed to waive them. In fact, the magistrate judge specifically found that Shabaz had "hedged his bets" by talking and getting the benefit of cooperation while refusing to sign the waiver and thus enabling his subsequent claim of non-waiver of rights. The district court accepted the magistrate judge's findings and recommendations in their

entirety. Based on those factual findings, we conclude too that Shabaz made a knowing and voluntary waiver of his *Miranda* rights.

We AFFIRM the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 07 CR 855
v.	)	Suzanne B. Conlon, Judge
SAMUEL SHABAZ	)	
Defendant.	)	

MEMORANDUM OPINION

(Filed June 2, 2008)

Samuel Shabaz is charged with two bank robberies and one attempted bank robbery by force or violence under 18 U.S.C. § 2113(a). Shabaz moved to suppress statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and evidence seized thereafter. The motion was referred to a magistrate judge, who concluded that Shabaz: (1) knowingly waived his *Miranda* rights and volunteered statements to law enforcement personnel; and (2) voluntarily consented to the government's search of his property. The magistrate judge recommended denial of Shabaz's motion. Shabaz objects to the magistrate judge's findings. The court has reviewed the transcript of the evidentiary hearing, the evidence submitted at the hearing, and the pleadings. For the reasons discussed below, the court adopts the

magistrate judge's recommendation and denies the motion to suppress.

THE SUPPRESSION HEARING

The hearing took place on March 31, April 1, April 3, and April 8, 2008. The magistrate judge orally issued his report and recommendation on April 11, 2008. The government's witnesses at the hearing were FBI agents Brian Wentz and Bryan Watson, and Oak Lawn police detectives Dennis Keenan and James Hunt. Shabaz testified on his own behalf.

I. TESTIMONY BY GOVERNMENT WITNESSES

Shabaz was arrested by FBI agents and Oak Lawn police officers at his home on December 21, 2007. Tr. 7, 74. He was transported to the Calumet City police station. Tr. 8. Upon arrival, he requested to use the bathroom. Tr. 8. At some point prior to receiving his *Miranda* rights, FBI agent Watson testified that he heard Shabaz use the word "attorney" or "lawyer." Tr. 79. Watson did not recall the context in which the word was used, nor did he inquire further. Tr. 79, 124. He was certain Shabaz did not request an attorney. Tr. 79-80. The other law enforcement officers testified that Shabaz never requested an attorney at any time, nor did he mention an attorney. Tr. 12, 25, 79, 142-144, 146, 177, 186.

After Shabaz used the restroom, the law enforcement officers accompanied him to an interview room. Tr. 144, 180. Oak Lawn police detective Christine McGuire was also present during portions of the interview, but did not testify at the hearing. Tr. 105, 180.

FBI agent Watson made introductory remarks to Shabaz, identifying law enforcement personnel, explaining why Shabaz was arrested, and stating the topics law enforcement officers wished to discuss. Tr. 10, 78, 114, 199. FBI agent Watson then read Shabaz an advice of rights *Miranda* waiver form. Tr. 14, 144. Shabaz stated he understood his rights, but refused to sign the waiver form. Tr. 15. After refusing to sign the form, Shabaz told Watson he would continue speaking to the FBI agents and police detectives and stop at any time if he felt he did not want to answer any question. Tr. 81-82, 145, 181-82. Shabaz then made incriminating statements regarding his involvement in the robberies of the TCF bank at 9801 S. Cicero Ave, Oak Lawn, Illinois, on April 26, 2007 and on October 1, 2007, as well as the attempted robbery of the Standard Bank and Trust at 4700 111th Street, Oak Lawn, Illinois, on September 21, 2007. Tr. 89-90, 184-85. Shabaz signed and identified himself in surveillance photos from each of the bank robberies. Tr. 91.

Early in the interview, Shabaz requested permission to call his girlfriend, Maritza Velasquez, and a friend named Khabir, who Shabaz was scheduled to pick up at the airport. Tr. 10, 247, 271. Shabaz did

not have Khabir's telephone number, but he told law enforcement officers they could retrieve Khabir's number from his cell phone at his residence.[1] Tr. 19, 29. Shabaz was not permitted to call Velasquez or Khabir until the interview was concluded, because of the possibility he might call them to further or conceal criminal activity. Tr. 10-11, 29-30, 134. When Shabaz called Velasquez after the interview, he did not request her to find him an attorney. Tr. 187.

Shortly after Shabaz refused to sign the advice of rights waiver form, he was presented with a consent-to-search form. Tr. 15, 17. The form consented to the search of Shabaz's house, two Dodge vans on his property, and his cellular phone. Tr. 17-18, These search items were handwritten on the form in Shabaz's presence prior to his signature. Tr. 18, 83. Shabaz gave law enforcement officers his cell phone number to be included on the form so that they could retrieve Khabir's phone number for him. Tr. 19.

At no time during the interview did any law enforcement officers promise leniency in exchange for Shabaz's cooperation. Tr. 12, 86, 94, 186.

---

[1] During the interview, FBI agents remained at Shabaz's residence, FBI agent Wentz remained in communication with the FBI agents at the residence throughout the interview. Tr. 10.

II. SHABAZ'S TESTIMONY

Shabaz's testimony substantially differs. When he was arrested and taken into custody, he testified he did not know why he was arrested and was not informed why he was taken into custody. Tr. 235-36. When he was taken to the Calumet City police station, he asked to use the restroom. After using the restroom (and prior to entering an interview room), Shabaz testified that he asked FBI agent Watson, "am I going to be able to get an attorney?" Tr. 241, 276. Watson replied, "let's just get you down here," escorting Shabaz to the interview room. Tr. 241, 276-77.

When they entered the interview room, Watson told him that "we know what you've been doing," and asked him "to start at the beginning." Tr. 243-244. Shabaz requested an attorney several times but was ignored. Tr. 243, 245-47, 249, 290. He testified he wanted to make a phone call to Velasquez to inform her of his situation and to ask her to contact a lawyer. Tr. 290. He was refused phone calls until he agreed to cooperate with law enforcement officers. Tr. 246-48, Shabaz testified he was repeatedly told that he would be treated with leniency if he cooperated. Tr. 249, 280. This exchange occurred for approximately ten or more minutes prior to receiving the advice of rights waiver form. Tr. 250. When Shabaz refused to sign the waiver form, law enforcement officers continued their questioning without inquiring why he refused to sign the form. Tr. 254.

Shabaz stopped requesting an attorney because he believed he would not be provided one. Tr. 255. He made incriminating statements and signed the consent to search form because he would be unfavorably treated if he did not. Tr. 262. He testified that when he signed the consent to search form, the form was blank with respect to the places to be searched. Tr. 251, 258.

After the interrogation, Shabaz was allowed to telephone Velasquez. He testified on direct examination that he "explained his situation to her." Tr. 267, On cross-examination, he claimed he asked Velasquez to contact an attorney for him. Tr. 285.

Shabaz was convicted of armed robbery in 1997 and 2001. Tr. 285-86. He was advised of his *Miranda* rights on a previous occasion. Tr. 286. Prior to his 1997 conviction, he signed a waiver of rights form similar to the form in this case. Tr. 288.

THE MAGISTRATE JUDGE'S FINDINGS

After hearing the testimony, the magistrate judge concluded the evidence does not provide a basis for suppressing the evidence. The magistrate judge found that because Shabaz refused to sign the advice of rights waiver form, the government had a heavy burden to establish by a preponderance of the evidence that Shabaz knowingly and voluntarily waived his *Miranda* rights before his admissions to law enforcement officers. Tr. 352-53 (citing *United States v. Jenkins*, 440 F.2d 574, 576 (7th Cir. 1971); *United States v.*

Millen, 338 F. Supp. 747, 752 (E.D. Wis. 1972); *United States v. Hedgemen*, 368 F. Supp. 585, 598 (N.D. Ill. 1983)). The magistrate judge concluded the government sustained its heavy burden.

First, the magistrate judge found Shabaz's *Miranda* rights were not violated at the time of the arrest, because he was not questioned nor gave statements at that time. In considering the circumstances of the arrest, the magistrate judge found that Shabaz was not so overwhelmed to render *later* statements at the Calumet City police station involuntary. Tr. 355.

Second, the magistrate judge credited Shabaz's account that he asked Watson, "am I going to be able to get an attorney?" prior to entering the interview room. Tr. 357-58. However, when Watson responded by directing Shabaz to the interview room, the magistrate judge found that Shabaz was not denied a right to counsel at that time, but the question was deferred until he entered the interview room. Tr. 358.

Third, the magistrate judge found Shabaz knowingly waived his *Miranda* rights and volunteered inculpatory statements in the interview room. Although the magistrate judge found that Shabaz was handcuffed during the interview, he otherwise credited the government witnesses' accounts of the interview over Shabaz's. The magistrate judge found that Watson made brief introductory comments notifying Shabaz why he was under arrest, and then advised Shabaz of his *Miranda* rights contained in the advice of rights waiver form. Tr. 362. When Shabaz refused to sign

the waiver form, the magistrate judge found he agreed to speak to the law enforcement officers, notifying them he would stop if and when he decided to do so. Tr. 263. The magistrate judge concluded that Shabaz began to talk to the FBI agents and Oak Lawn detectives without any promises and without asking for an attorney. Tr. 363.

Fourth, the magistrate judge concluded Shabaz freely consented to the search of his property. He was given the consent to search form after he was presented with the waiver form. The magistrate judge credited the government witnesses' rendition that the handwritten consent to search information was filled in during Shabaz's questioning, and that he signed the final copy with full knowledge of the handwritten locations to be searched.

Fifth, the magistrate judge discredited Shabaz's testimony that he requested to call his girlfriend to secure an attorney for him. The magistrate judge found that when Shabaz had the opportunity to call Velasquez, he did not ask her to contact an attorney. The magistrate judge also concluded Shabaz's request for phone calls was reasonably denied when the interview began because there was a reasonable fear that he might contact co-conspirators.

I. STANDARD OF REVIEW

The court must "make a *de novo* determination of those portions of the [magistrate judge's] report or proposed findings or recommendations to which

objection is made." 28 U.S.C. § 636, The court is not required to hold further hearings to review the magistrate judge's findings or credibility determinations. *United States v. Raddatz*, 447 U.S. 667, 676, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). Rather, the district court has discretion to "accept, reject, modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1); *Gaffman v. Grass*, 59 F.3d 668, 671 (7th Cir. 1995). The court may decline to exercise its *de novo* discretion in reviewing the credibility determination made by the magistrate judge. *Raddatz*, 447 U.S. at 676, 100 S.Ct. 2406. Indeed, the court may give the magistrate judge's credibility determinations such weight "as their merit demands." *Id.*, at 683, 100 S.Ct. 2406.

II. REFUSAL TO SIGN THE ADVICE/WAIVER OF RIGHTS FORM

Shabaz objects to the magistrate judge's finding that he voluntarily waived his *Miranda* rights, especially considering that he refused to sign the advice of rights waiver form. The two issues before the court are whether Shabaz knowingly and voluntarily waived his right against self-incrimination and whether he volunteered statements to law enforcement officers. The government bears the burden of proving these requirements by a preponderance of the evidence. *United States v. Jackson*, 300 F.3d 740, 748 (7th Cir. 2002); *Colorado v. Connelly*, 479 U.S. 157, 168-69, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Because

Shabaz refused to sign the advice of rights waiver form, the government has a heavy burden to establish waiver. *Jenkins*, 440 F.2d at 576.

In assessing Shabaz's waiver and statement, the court considers "whether, in light of the totality of the circumstances, the statement was the product of a rational intellect and free will." *United States v. Brooks*, 125 F.3d 484, (7th Cir. 1997).[2] A written waiver is not required; waiver may be inferred from Shabaz's understanding of his rights coupled with conduct reflecting a desire to give up the right to remain silent. *North Carolina v. Butler*, 441 U.S. 369, 373-76, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); *Jackson*, 300 F.3d at 748. His refusal to sign a waiver may suggest that subsequent statements were not voluntary, but even when a defendant has expressly declined to sign a waiver, subsequent statements may be determined voluntary. *See, e.g., United States v. Crisp*, 435 F.2d 354, 358-59 (7th Cir. 1970); *United States v. Banks*, 78 F.3d 1190, 1196-98 (7th Cir. 1996), *vacated on other grounds*, 519 U.S. 990, 117 S.Ct. 478, 136 L.Ed.2d 373 (1996), *on remand*, *United States v. Mills*, 122 F.3d 346 (1997), *cert. denied*, 522 U.S. 1033, 118 S.Ct. 637, 139 L.Ed.2d 615 (1997). A confession is involuntary only where it was obtained through police coercion or

---

[2] Other factors include: "defendant's background and conduct, the duration and conditions of detention, the mental and physical condition of the defendant, the attitude of the police, and whether the police utilized psychological or physical coercion." *Jackson*, 300 F.3d at 748.

overreaching that overbore the accused's free will. *United States v. Murdock*, 491 F.3d 694, 699 (7th Cir. 2007).

Shabaz claims that his refusal to sign the advice of rights waiver automatically invoked his right to remain silent, rendering any statements resulting from subsequent interrogation inadmissible. He relies on *Hedgemen*, 368 F. Supp. at 585, *United States v. Nielsen*, 392 F.2d 849 (7th Cir. 1968), and *Jenkins*, 440 F.2d at 574, where defendants' refusal to sign waivers of rights forms were held to constitute a desire to remain silent. The magistrate judge rejected application of these cases, instead relying on *Crisp*, 435 F.2d at 354, where the Seventh Circuit held that even though a defendant refuses to sign a rights waiver form, he may still be deemed to have waived his rights if he persists in an expressed desire to make a statement. The magistrate judge found that *Crisp* was applicable to this case because according to the government witnesses, Shabaz unequivocally stated he would speak voluntarily without an attorney and would stop when he wanted (even though he refused to sign the waiver). The magistrate judge credited this testimony over Shabaz's testimony that he was coerced to make statements in exchange for leniency for several persuasive reasons.

Shabaz's testimony that his waiver was involuntary appeared to lack credibility because there was no evidence of coercion in the interrogation room. Although he was handcuffed, he did not testify to any physical discomfort or coercion. He was allowed to

use the restroom, and was given water while in the interview room. The interview was not unduly long, lasting approximately an hour.

Shabaz's testimony that he was coerced by promises that law enforcement personnel would "go to bat" for him was undermined by the fact that he claimed he trusted those he knew were violating his rights. Tr. 366. Although he testified he was confused and had no idea what was going on, the magistrate judge observed that he was not naive or unschooled in his rights. Rather, his testimony reflected that he was sophisticated and familiar with the criminal justice system. Tr. 367. The magistrate judge reasonably concluded that it was likely that Shabaz – as an experienced criminal – hedged his bets by refusing to sign the waiver while agreeing to cooperate to ascertain whether he could benefit from volunteering statements, Due to all of these reasons, the magistrate judge credited the government witnesses' testimony and found that the government met its burden in showing that Shabaz knowingly waived his *Miranda* rights and volunteered incriminating statements. *Compare Hedgemen*, 368 F. Supp. at 585; *Nielsen*, 392 F.2d at 849; *Jenkins*, 440 F.2d at 574.

After reviewing the record, there is no reason to set aside the magistrate judge's credibility determination and findings. Shabaz's conduct demonstrated a waiver of his right to remain silent. Although aware of his rights, he immediately began talking to law enforcement officers after refusing to sign the waiver form and continued to do so for an hour. He

never requested an attorney and never asked that the questioning be stopped. These facts support a finding Shabaz waived his *Miranda* rights. *See, e.g.*, *United States v. Smith*, 218 F.3d 777, 781-82 (7th Cir. 2000) (despite failure to sign waiver form, record established statements were voluntary); *United States v. Gardner*, 516 F.2d 334, 341-42 (7th Cir. 1975) (same); *Crisp*, 435 F.2d at 354.

III. QUESTIONING AFTER REQUEST FOR. A LAWYER.

Shabaz contends his *Miranda* rights were violated because questioning did not cease following a request for counsel. Once a suspect invokes the right to counsel, all interrogation must cease until counsel is present, unless the accused himself initiates further communication. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *United States v. Jackson*, 189 F.3d 502, 511 (7th Cir. 1999). If the accused is interrogated after he has invoked his right to counsel, any incriminating statements he makes are inadmissible. *Edwards*, 451 U.S. at 487, 101 S.Ct. 1880.

The magistrate judge gave credence to Shabaz's testimony that he asked Watson if he would be able to get an attorney prior to entering the interview room. Although Watson testified that Shabaz never requested an attorney, he also testified that he heard Shabaz use the word "attorney." The magistrate judge construed this testimony in favor of Shabaz. However,

the magistrate judge found that when agent Watson responded to Shabaz's request by stating, "let's just get you in here," (directing Shabaz to the interview room), Watson did not deny Shabaz's right to counsel, but rather deferred the question until the parties entered the interview room when he was advised of his right to counsel.

Shabaz contends it is undisputed that he was immediately questioned upon entering the interview room. He cites his own testimony that he repeatedly requested an attorney within 15-20 minutes. This testimony, however, directly conflicts with that of the government witnesses, which indicated that upon entering the interview room, Shabaz was briefly told why he was there, and was then immediately given *Miranda* warnings. The magistrate judge found the government witnesses' testimony more credible.

The court adopts the magistrate judge's credibility determination and finding that when Shabaz entered the interview room, Watson informed him why he was arrested and the subjects that the law enforcement officers wished to discuss. Tr. 10, 78, 114, 199. The court also adopts the finding that immediately after this brief introduction, Watson read Shabaz his *Miranda* rights.

Contrary to Shabaz's objection, Watson's introductory remarks did not constitute an "interrogation" in violation of *Miranda*. *See Rhode Island v. Innis*, 446 U.S. 291, 299, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). "Interrogation" refers to "express questioning"

as well as "any words or actions on the part of law enforcement (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" *Id.* at 300-01, 100 S.Ct. 1682; *United States v. Abdulla*, 294 F.3d 830, 834 (7th Cir. 2002). The test is whether a reasonable objective observer would have believed that the law enforcement officer's statements to the defendant were reasonably likely to elicit an incriminating response. *Abdulla*, 294 F.3d at 834 (internal quotations omitted); *United States v. Westbrook*, 125 F.3d 996, 1002 (7th Cir. 1997).

Watson's introductory words were not reasonably likely to elicit an incriminating response because they were in response to Shabaz's own inquiry as to why he was there. *See, e.g., United States v. Briggs*, 273 F.3d 737, 740 (7th Cir. 2001) (a response to an inquiry by the defendant does not constitute "interrogation") (collecting cases); *United States v. Hendrix*, 509 F.3d 362, 374 (7th Cir. 2007). The record reflects Watson's remarks were consistent with an explanation why Shabaz was under arrest. The court adopts the magistrate judge's determination that Shabaz's right to counsel was not violated prior to advice of his *Miranda* rights.

IV. DENIAL OF REQUEST FOR TELEPHONE CALLS

Shabaz was denied requested phone calls to Velasquez or Khabir at the outset of the interview. He contends this denial violated his *Miranda* rights. *See, e.g., United States v. Millen*, 338 F. Supp. 747, 752 (D.C. Wis. 1972) (defendant's request for a phone call constituted an assertion of *Miranda* rights). Shabaz insisted in his testimony that he requested to call Velasquez so she would contact an attorney. Tr. 62, 121. The magistrate judge did not lend credibility to this testimony, instead finding that based on the evidence there was no indication that Shabaz requested phone calls to contact an attorney. Tr. 358-61.

A review of the transcript supports this finding, When Shabaz was allowed to call Velasquez after the interview, Oak Lawn detective Hunt testified that he did not hear Shabaz request an attorney. Tr. 187. On direct examination, Shabaz himself failed to testify that he told Velasquez that he needed an attorney.[3] There was no corroborating evidence, from Velasquez or any other source indicating that Shabaz requested an attorney. To the contrary, the government witnesses testified that Shabaz never gave any indication that his phone calls were for the purpose of requesting an attorney. As the magistrate judge duly noted, law enforcement officers reasonably denied

---

[3] As the magistrate judge pointed out, Shabaz only testified that he did so on cross-examination.

Shabaz's open-ended phone call request because of the need to confirm that a call would not be in furtherance of criminal activity. The evidence supports this conclusion, especially considering that bomb threats were purportedly made in the underlying robberies. Tr. 136. The law enforcement officers' denial of Shabaz's request to call Velasquez or Khabir at the beginning of the interview did not violate his *Miranda* rights.

VI. FALSE PROMISES OF LENIENCY

Shabaz contends that false promises of leniency rendered his statements involuntary, violating his Fifth Amendment rights. Again, his argument assumes that the magistrate judge should have credited his testimony over the contrary testimony of government witnesses. *See* Tr. 363, 21,82,146, 187. The magistrate judge discredited Shabaz's account that he was swayed by an offer of leniency, noting that Shabaz was aware of his rights, yet surprisingly claimed to trust those who he claimed were violating his rights. Tr. 365-68. The court adopts the magistrate judge's credibility determination, and the finding that Shabaz's will was not overborne by any promises of leniency.

VI. FAILURE TO PRODUCE MATERIAL WITNESSES

Shabaz contends the government failed to meet its burden of demonstrating voluntary waiver

because it did not produce all material witnesses at the evidentiary hearing. Specifically, he argues Oak Lawn detective Christine McGuire, who witnessed portions of Shabaz's interview on December 21, 2007, was not called as a witness. Without citing any authority, he contends that the failure to call McGuire as a witness precluded the government from meeting its burden.

The government responds that an adverse inference from a party's failure to produce a material witness may only be drawn if the evidence shows that the witness was either physically or pragmatically available to only one party. *See United States v. Pizarro*, 717 F.2d 336, 346 (7th Cir. 1983). The government argues it previously provided Shabaz with McGuire's written interview, thereby dispelling the notion that her testimony was available only to the government. *See* Gov. Resp. Ex. A. The government contends that it did not call her as a witness at the hearing because she would have offered cumulative testimony. Indeed, there is no basis in the record to support an adverse inference from the government's decision not to call her as a witness. *Cf. Pizarro*, 717 F.2d at 346.

CONCLUSION

For the foregoing reasons, Shabaz's objections to the magistrate judge's recommended findings of fact and conclusions of law are overruled. The court

adopts the magistrate judge's recommendation in its entirety. The motion to suppress is denied.

ENTER:

/s/ Suzanne B. Conlon
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. SAMUEL SHABAZ, Defendant.	)	No. 07 CR 855 Chicago, Illinois April 11, 2008 9:00 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
SIDNEY I. SCHENKIER

APPEARANCES:

For the Government:	HON. PATRICK J. FITZGERALD UNITED STATES ATTORNEY BY: MS. NATHALINA A. HUDSON MS. MICHELLE NASSER WEISS 219 South Dearborn Street Suite 500 Chicago, Illinois 60604 (312) 744-9653
For the Defendants:	LAW OFFICES OF ELLEN R. DOMPH BY: MS. ELLEN R. DOMPH 53 West Jackson Boulevard Suite 1544 Chicago, Illinois 60604 (312) 922-2525

Court Reporter:

CHARLES R. ZANDI, CSR, RPR, FCRR
Official Court Reporter
219 S. Dearborn Street
Suite 1728
Chicago, Illinois 60604
(312) 435-5387
email: charles_zandi@ilnd.uscourts.gov

[350] (Proceedings heard in open court.)

THE CLERK: 07 CR 855, United States of America versus Samuel Shabaz.

MS. HUDSON: Nathalina Hudson and Michelle Weiss on behalf of the United States.

THE COURT: Good morning.

MS. WEISS: Good morning, your Honor.

MS. DOMPH: Ellen Domph on behalf of Mr. Shabaz.

THE COURT: Good morning. Did the rightful owner of those notes –

MS. DOMPH: They were mine.

THE COURT: – left at the podium pick them up?

MS. DOMPH: Yes. Were they here?

THE COURT: They were underneath the podium. That's how you forgot them.

MS. DOMPH: Thanks.

THE COURT: I'm prepared to rule on the motion. I'm not going to issue a written opinion. I'm going to make findings on the record. My findings will stand as my findings and the recommendation that I make on the motion to suppress. So, it will probably take a few minutes. If people want to sit down, that's fine.

I am – let me begin by thanking the lawyers for the presentations that they made. I think you made very fine presentations. I especially appreciate the authority that [351] Ms. Domph supplied after the hearing, which I thought was a very fair selection of cases that address this issue from different perspectives, and I think that was very helpful to the Court as I then heard your arguments.

I am going to recommend to Judge Conlon that the motion to suppress be denied. What I'm going to do now is set forth the various findings and the case law that leads me to that recommendation.

And let me start with an overview of what I consider to be the important case law on this point. Of course, what we were dealing with as the threshold here was whether there was a knowing and intelligent waiver of Miranda rights by Mr. Shabaz. Plainly, Miranda rights, just about like any rights that we have, can be waived; but in order for that waiver to be effective, it must be a knowing and a voluntary waiver. *United States versus Jackson,* 300

F.3d, 740 at 748, a Seventh Circuit decision from 2002.

That waiver must be the product of rational intellect and free will. *United States versus Brooks,* 125 F.3d, 484, Seventh Circuit decision, 1997.

And in deciding whether the waiver meets that standard, we look at the totality of the circumstances, which includes consideration of the defendant's background and conduct, the duration and conditions of detention, the mental and physical condition of the defendant, the attitude of the [352] police, and whether the police utilized psychological or physical coercion. *Jackson,* 300 F.3d at 748.

The burden of proof is on the government to show that the waiver was knowing and voluntary, with the burden being by a preponderance of the evidence. *Lego versus Twomey,* T-W-O-M-E-Y, 404 United States 477 at 489, a 1972 decision.

Now, of course, one way of showing that there was a knowing and intelligent waiver is to have a document such as was an exhibit in this case, an advice of rights, Government Exhibit 1, that is tendered to the defendant and that is signed by the defendant. The case law indicates that this kind of written waiver is not required in order for there to be an effective waiver. *Jackson* holds that at 300 F.3d at 748, as does *United States versus Crisp,* 435 F.2d 354-358, a Seventh Circuit decision from 1970.

But we don't have, in this case, as I've indicated, and the evidence clearly shows, a signed waiver of rights. But what we have is a situation where the waiver of rights form, the advice of rights with the waiver on it, was tendered to the defendant, and the defendant refused to sign it. I don't think that there's any dispute in the evidence that there was a refusal to sign it.

And in that scenario, Seventh Circuit case law indicates that the government has a – the case law says heavy burden or especially heavy burden variously, to show that the [353] waiver is voluntary. *United States versus Jenkins,* 440 F.2d, 574-576, the Seventh Circuit decision from 1971 calls the burden a heavy one. *United States versus Millen,* 338 Federal Supplement 747 at 752, an Eastern District of Wisconsin decision from 1972, calls it an especially heavy burden. *United States versus Hedgemen,* H-E-D-G-E-M-E-N, 353 Federal Supplement 585 at 598, a Northern District supplement from 1983, speaks of the already heavy burden being greater.

Now, none of those cases in any way quantify what the difference is between that heavy burden and preponderance of the evidence, but I think that tells counsel at a minimum that when you have a written waiver that is tendered to the defendant and the defendant refuses to sign it, a very close look at the evidence is warranted to determine whether, in fact, any subsequent statements were voluntary.

Now, the Seventh Circuit case law indicates that there are circumstances where that – where the refusal to sign the waiver will not render subsequent statements involuntary. *Crisp* is one scenario where in that case, the defendant, despite making – despite being given an advice of rights form and being asked to sign a written waiver, refused to sign it, made an obvious – expressed an obvious desire to talk to the agents despite not signing it and without there being intervening colloquy or discussion between the agents or officers and the defendant.

[354] On the other hand, we have a situation such as in *Jenkins,* where the subsequent statement was suppressed, where there was a refusal to sign the waiver of Miranda rights, but there was then further discussion or interrogation that ensued before any statements were made, discussions that were initiated not by the defendant but by the officers or agents. And *Hedgemen* presents a similar situation.

And in *Hedgemen,* the Court suggested that when someone refused to sign a right – I'm sorry, a waiver of rights, then there is some intervening delay or some inconsistency as a result of further discussion, and then they decide to talk to agents, that there should be further inquiry to make sure that there is an intent to waive.

Now, it's in consideration of that case law that I have assessed the evidence and that I make the findings and the recommendations that I do. And I want to start with a brief discussion of the

circumstances of the arrest, which are not, I think, in material dispute.

Approximately 8:00 a.m. or so on December 21st, 2007, a number of agents and officers from the Oak Lawn Police Department, the FBI, and Chicago Police Department assembled outside of the defendant's home. They entered the home after knocking and having no response. They entered by breaking down the door. They entered with guns drawn.

The defendant was found in bed, clothed in sweat [355] pants and shirt, which would be consistent with being a sleeping outfit or having been up and gone back to bed, but certainly early in the morning, about 8:00 o'clock or so. He was handcuffed. He was then taken in a police car to the Calumet police station.

At that time, at the time of the arrest, there is no dispute that Mr. Shabaz was not given any Miranda warnings, but there also is no dispute that he made no statements and was not questioned about the offense at that time.

In looking at the circumstances of the arrest, I don't find that they were such that they overwhelmed Mr. Shabaz's will and rendered any later statements to be involuntary. At least from what I have observed, it is not uncommon for officers who enter a house to make an arrest to have a show of force to deter people who may be inside from resisting in some violent manner.

Mr. Shabaz had been arrested before, so this was not a new event. Whether it was a new event to be done in this way, there's no evidence, so I can't speak to that. But I will note that the evidence from Mr. Shabaz's testimony was that he was sufficiently composed at the time that when he left the house, he asked for certain things, and he was able to observe what time it was when he left the house.

I don't see anything in the circumstances of the arrest that leads me to conclude that Mr. Shabaz, by that [356] event, had his will overwhelmed, and I note that during the defense's very fine closing argument, this was not cited as a factor that led to any later statement being involuntary. But because there was significant testimony about it, I do address it.

Mr. Shabaz was then taken in a police car to the Calumet police station. He was removed from the car by several agents. They were walked – they walked up the corridor to a room, at which time, before they entered the interview room, Mr. Shabaz asked to be able to use the bathroom, and he was allowed to do so.

Before the officers and agents who accompanied Mr. Shabaz took him in to the police station, the undisputed testimony is that they left their guns locked in the trunk of one of the cars so that they were not armed when they accompanied Mr. Shabaz in to the police station. Mr. Shabaz, of course, was handcuffed.

Now, there is testimony about the use of the word "attorney" or "counselor" at the time that Mr. Shabaz went to the rest room. The testimony from Agent Watson was that he heard the word "attorney" or "counselor," but he did not know the context in which it was used. He did not interpret it as a request for an attorney, but he also testified that he didn't know what it referred to. He made no inquiry into what it referred to.

[357] Mr. Shabaz's testimony is different than that. He says that he asked, "Am I going to be able to get an attorney," and Mr. – and Agent Watson's response was, "Let's get into the interview room."

Now, under Agent Watson's rendition of this, I'm troubled by the proposition that when a defendant in custody, which Mr. Shabaz plainly was, pursuant to an arrest warrant that had been issued, when an agent has a person in custody and the person makes reference to an attorney or counsel, that there is apparently a lack of curiosity or interest in knowing what the defendant is referring to and finding out whether that is a request for counsel.

Agent Watson did testify later that he was very concerned about making sure that people had their rights, and I think that it would be consistent with that if he heard the word "counsel" or "attorney" to find out what that was referring to instead of, according to Agent Watson, simply, really ignoring it because he didn't understand it, and because he didn't understand it, he didn't interpret it as a request for

counsel. That is not conduct that is, in my judgment, appropriate for officers or agents to – to do when they have a person in custody and they make reference to an attorney or counsel.

Now, that said, under Mr. Shabaz's rendition of what occurred, there was not at that time a refusal to provide [358] an attorney. There wasn't a denial. "Am I going to be able to get an attorney?" He says, according to Mr. Shabaz, Agent Watson did not say, "No, you are not." What he did was he deferred the question, based on Mr. Shabaz's testimony, to the time when they entered the interview, which was immediately after going to the bathroom.

So, while I – even accepting Agent Watson's testimony, I would be very critical of his conduct, even accepting Mr. Shabaz's testimony, I don't find that there was a denial of counsel at that point; but it is simply, in my judgment, under his rendition, a deferral until they entered the interview room, which was immediately thereafter.

Now, in the interview room, we have a great deal of dispute about what occurred or what didn't occur. And I want to break it into two categories. I guess two categories will suffice. One is what happened in the interview room prior to Mr. Shabaz being provided with the advice of rights form that is Government Exhibit 1 and being asked to sign a waiver, and then the second is what happened when that was presented and the immediate aftermath of that.

Now, according to the – you know, I'm sorry. Before I get to that, there's one other matter I want to address before that, and that is a request for a phone call. There is testimony that either right before or right when he got in to the interview room, Mr. Shabaz asked to call his girlfriend [359] Maritza, call another friend, Khabir. Mr. Shabaz says that he indicated he wanted to contact his girlfriend in part in order to have her contact an attorney.

Now, with respect to the request to contact Khabir, I think the undisputed testimony was that Mr. Shabaz didn't have Khabir's phone number, and that where that phone number was located was in Mr. Shabaz's telephone, and that telephone was in his home and not at the station. I'm going to circle back to that later.

With respect to the request to call Maritza, I don't find it credible that he was asking to contact Maritza in order for her to contact an attorney or to provide other assistance.

Now, I note that when Mr. Shabaz did contact Maritza in a telephone call after the events at the Calumet police station were concluded and he was being transported to FBI facilities, he testified that he did ask Maritza to get an attorney. Now, Officer Hunt from the Oak Lawn Police Department, who was in the back seat with Mr. Shabaz, said that he heard Mr. Shabaz's end of the conversation, and that Mr. Shabaz did not make that request to Maritza.

I find that credible for several reasons. One is that when Mr. Shabaz said that he asked for an attorney, at least my notes reflect, he did not do that on the direct examination by his attorney but injected that for the first time on cross-examination.

[360] Beyond that, I don't have any corroborating evidence, which would strike me would be available if it existed, that Maritza, in fact, received that request. I don't have any evidence that there was an attorney contacted by Maritza in response to any inquiry made by Mr. Shabaz, as he alleges. I also don't have any evidence that some attorney who was allegedly contacted by Maritza ever reached out and tried to contact Mr. Shabaz. So, I don't have any corroboration of that, and in all the circumstances, I credit Officer Hunt's testimony over that of Mr. Shabaz on this point.

There was also testimony concerning some reason by the defendant – I'm sorry, by the government to delay any phone call because of concern over potential bomb-making material that had been found in Mr. Shabaz's home that, according to the government, was in plain view. Now, there was some discrepancy in the government testimony. Particularly, Mr. – Agent Watson testified that there were bomb dogs brought to the house, or a bomb dog – I should say a bomb-sniffing dog brought to the house to determine whether that was the case. That was later corrected, that it was some other bomb personnel.

But under either version, the fact that there is undisputed testimony that there were personnel sent to the house because of some concern over there being bomb-making material there does provide some corroboration for why the [361] government may have been concerned about simply allowing a phone call to someone that the government had not yet determined anything about.

I think that it was reasonable for them to be cautious in those circumstances before allowing Mr. Shabaz to call a person and potentially communicate some kind of signal to someone who might be involved with him in that activity. And while the defense pointed out that the call could be monitored, which is certainly true, monitoring a call may or may not be effective if you don't know what kind of code or signals people may be speaking in if they're doing it.

Now, as it turned out – as it turned out later, upon further inquiry, there wasn't bomb-making material or there were no bombs that were made or found, so it turned out to be a false alarm; but that's something that was determined after the fact, and so when looking at it from the vantage point of the officers and agents at the time, before it was determined to be a false alarm, I think that their activity – their caution in allowing the phone call was appropriate.

Now, let me turn to the interview room and what allegedly occurred prior to the tender of the advice of rights and then subsequent to it. The government

witnesses all testified that prior to the tender of the advice of rights form, there was very little that was said. Both Special Agent Wentz and Agent Watson testified, you know, in a generally [362] consistent way on this point.

Special Agent Wentz said it was basically, "We know it's you." Agent Watson testified that he explained why the defendant was under arrest. And they then said that he was thereafter immediately given the advice of rights form.

Defendant has a very different recollection of what occurred. Mr. Shabaz testified that there was extended questioning that preceded any tender of the advice of rights form, most of it by Agent Watson, although some of it by Officer Keenan.

Mr. Shabaz said that he consistently, during this period, asked for an attorney, asked for phone calls. Mr. Shabaz said that Agent Watson said, "We know what you did. We have evidence. Tell us what happened." He said there was a refusal to take off the handcuffs, even though Mr. Shabaz requested it.

And on that point, I do find it credible that Mr. Shabaz was handcuffed in some fashion during this interview. I don't find any government testimony that contradicts that. Most of the government witnesses testified to a lack of recollection about whether he was handcuffed, which I find rather remarkable, given that they were in the room with him for, by everybody's account, about an hour, and that during this period of time, Mr. Shabaz signed one form,

Government Exhibit 2, the consent to search, and also made [363] notations on some photographs. I think that was Government Exhibit 4. And it would seem to me it would be pretty obvious whether somebody is handcuffed when they were affixing their signature or other writings to various materials. So, I find that Mr. Shabaz was, in fact, handcuffed during the interview.

Mr. Shabaz said that Agent Watson asked several times about what happened in April, referring to the date of alleged criminal activity, and that Mr. Shabaz needed to talk before getting a phone call. Mr. Shabaz said that Agent Watson told him, "It will go easier if you talk now," and that Officer Keenan then spoke and said prosecutors look favorably on cooperation and so things would go easier if, in fact, Mr. Shabaz cooperated. Mr. Shabaz said that only after all of this colloquy, which took, according to Mr. Shabaz, about 10 minutes, did he receive the waiver of rights form.

Now, the government says that when the form was presented, Mr. Shabaz read it aloud, but refused to sign it, but at the same time he refused to sign it also said that he would talk to the agents and officers, and that he would stop if and when he decided to do so, and that he then began to talk to them without any promises being made and without asking for an attorney.

Mr. Shabaz again has a different rendition of the events. He said he was, in fact, given the waiver form, and that he did read the waiver form, although he –

and I keep [364] saying waiver form. It's titled advice of rights, and when I'm referring to that, it's Government Exhibit 1, so that we have clarity on the record.

Mr. Shabaz said that he read it to himself, not aloud. Mr. Shabaz testified that he had a good understanding of what his rights were, of what the advice of rights form meant. Mr. Shabaz testified he had been presented with such a form in connection with an earlier criminal matter with which he had been charged.

Mr. Shabaz said he told the officers and agents that he would not sign the form and that this prompted further statements and questions by Agent Watson and by Officer Keenan. Mr. Shabaz said that Officer Keenan said cooperation would go a long way and he should talk now. Agent Watson, according to Mr. Shabaz, said that he was looking at a lot of time, and it would be better if he cooperated now.

Mr. Shabaz said he asked to call Maritza, his girlfriend, and Agent Watson, in response, said, "This is a critical moment," and that cooperation would make things go easier.

Mr. Shabaz said that Agent Watson tried to question him then about names and dates and bomb-making materials, and that when Mr. Shabaz asked for a phone call, Mr. Shabaz was told to be patient.

Mr. Shabaz then said he finally started to talk to [365] the agents and to answer the substantive questions that he said were asked after about 20 minutes

of this conduct. Mr. Shabaz said he did so because he was frustrated and that he thought that if he played ball with the agents and officers, that they would go to bat for him.

Now, in considering the competing testimony on these matters, I find the government evidence to be more credible than that of Mr. Shabaz for several reasons. First, the circumstances in the interrogation room were not so onerous as to, by virtue of those circumstances, oppress Mr. Shabaz and rob him of the ability to exercise free will. Mr. Shabaz was handcuffed, but he did not testify to any physical discomfort, and there's no dispute that there was no physical coercion involved in terms of his interrogation. There was no threat of physical force that was used.

Mr. Shabaz had been allowed to use the rest room before entering the interview room. Mr. Shabaz testified that he had water while he was in the interview room. Mr. Shabaz testified that he had no food while he was in the interview room, but he also did not testify that he asked for any food from the officers.

And the time in the interview room was, by all accounts, relatively short, something in the range of an hour or so, plus or minus, depending on people's recollection of time. But we're talking about the same general range of time, [366] not an interview period that lasted for hours and hours and hours.

There's also no indication, of course, that Mr. Shabaz was sleep deprived, because he had just been

arrested after having slept and was arrested out of his bed, so – and I don't find, then, the circumstances of the interrogation in that respect to be such as to have overridden free will.

Second, I don't find it credible that Mr. Shabaz, if he experienced the conduct by the officers and agents that he described, would have talked to them because, as he said, he trusted them to go to bat for him if he did so. To accept that would be to accept the proposition that Mr. Shabaz chose to trust people who he said disregarded and violated the rights that he knew he had. I've heard no good explanation about, based on Mr. Shabaz's view, why he would trust the people who he says were violating his rights, why he viewed them as people who he could trust to go to bat for him, after, according to his testimony, 15 or 20 minutes in the interrogation room.

Third, and related to that point, Mr. Shabaz testified that he clearly understood his rights, and Mr. Shabaz is plainly an intelligent and well-spoken person. The evidence is that he is not a high school graduate, but he did get his high school equivalency, a GED. During his testimony, he displayed an excellent command of language. He displayed [367] excellent ability to understand the questions that were put to him and to answer them in a very clear manner. He plainly is familiar with the advice of rights form, as he testified.

So, we have here a defendant who is not a naive person who was unschooled in his rights. We have

here a defendant who is not a teenager or some young, unsophisticated person who had never been in this situation before. Mr. Shabaz testified that he had been in the situation of being interrogated, had been presented with an advice of rights form. He understood he had a right not to talk if he chose and that he had a right to talk if he chose to do that.

Fourth, as the Seventh Circuit decision in *Crisp* confirms, there are situations in which a defendant might refuse to sign an advice of rights form waiving his rights of silence and the right to have an attorney and yet intend to talk to agents or officers without an attorney and to do that knowingly and voluntarily.

One might ask, I suppose: Why would somebody do that? Apart from the answer that human motivation is always an interesting thing to discern, I can envision a situation where a defendant who is experienced in the criminal law and the system and has been through prior criminal offenses might do that to hedge his bets, to talk to the agents and officers and see if the cooperation helps, but at the same time, refuse to sign the form so if unsatisfied with the result, he can claim [368] that he did not talk voluntarily. And in reviewing all of the circumstances in the evidence, I find that that likely is what occurred here.

Now, with respect to the consent to search form, there are discrepancies in the evidence about certain aspects of the tendering of the form and the signing of the form. The government witnesses disagree about

precisely when the form was provided to Mr. Shabaz; but at least some of them agree with Mr. Shabaz that it was certainly more than a few minutes after Mr. Shabaz was presented with the advice of rights form and after he had started talking to the agents, and so I find that to be credible, that he did not sign and was not presented with the consent to search form until after he had been presented with the advice of rights form and after he had already started to talk to the agents about the case.

Now, there is also a dispute about whether the handwritten portion of the consent to search form, portions 1-A through D in Government Exhibit 2, had been placed on the form prior to it being handed to Mr. Shabaz, as the government witnesses say, or whether Mr. Shabaz was presented with the form in blank, without that handwritten material being filled in, and that Mr. Shabaz signed the form without having the material filled in, as he says.

I find the government testimony on that point about whether it was filled out before Mr. Shabaz signed it to be [369] more persuasive than that of Mr. Shabaz. As I said, all – well, not all, but I find that the credible evidence is that Mr. Shabaz was presented with the form after he started talking with the agents and officers about the case. The government testimony is that part of the information obtained that was written on the form was defendant's cell phone number. Defendant says he did not supply that number, but he offered no evidence about how the government got that information if not from him.

The government asking him for that information and him supplying that information is consistent with the defendant saying that he wanted to talk to Khabir, but he did not have his phone number, but that it was available in his cell phone at the home. And it would be then consistent with all of that for Mr. Shabaz to provide the cell phone number so that the phone could be accessed and the number could be located.

So, based on that evidence, I find that the form was filled out when it was presented to the defendant and when the defendant indisputably signed it. There is no dispute that, in fact, Mr. Shabaz signed the form.

Moreover, since I find that Mr. Shabaz voluntarily decided to talk to the agents and officers without an attorney despite refusing to sign the advice of rights form and that the consent to search form was signed after that, I don't find that there's anything about the consent form that would be tainted [370] by a Miranda violation, because I do not find there is a Miranda violation.

Now, in making these findings, I have considered that the agents and officers plainly were interested in having Mr. Shabaz make statements despite their view that they had strong DNA evidence. In a way, the government kind of resisted that a little bit, which I don't understand exactly why, because plainly, if they weren't interested in trying to talk to Mr. Shabaz to get statements, they could have

brought him right down to the courthouse here and had an initial appearance. I can't imagine that there was any reason to bring – have an intermediate step of bringing him to the Calumet police station and to sit him in an interrogation room and to ask him to waive rights so that they could question to get statements, that there's any reason for that other than they wanted to get statements.

But I also don't understand that there's any assertion that there is a violation of Mr. Shabaz's rights simply because the agents and officers took him to the Calumet police station instead of immediately to court in order to see if he would be willing to give statements. The alleged violation here isn't that they took him to the Calumet police station and asked him to waive rights and question him. The alleged violation is that they questioned him despite his alleged refusal to waive Miranda rights, and I have already [371] found that the government did not violate his rights in giving these statements.

I have also considered that the interest of whether – I'm sorry, the question of who is interested in terms of consideration of bias, motive, and interest of witnesses. Certainly, Mr. Shabaz's interest is plain. He'd like to have the statements suppressed, and so any time a fact-finder knows that somebody has an interest in the outcome, you consider that in assessing the testimony, so I do that.

But I reject the government's assertion that the agents and officers who testified are simply neutral

and disinterested witnesses, as they say, without any horse in the race. They plainly have an interest in defending their conduct: and if their conduct was improper, they plainly would have a motive to present testimony in a way to avoid that finding. So, I have considered that. And I reject the notion that somehow agents who interrogate a defendant, when they testify about that interrogation, are somehow neutral bystanders who have no bias or motive or interest in testifying about what occurred.

But I have – so, I have taken that into consideration. But for the reasons that I have expressed above, I find that the government testimony about what happened is more credible than that of Mr. Shabaz. And so for the reasons that I have stated, I will recommend that the motion to [372] suppress be denied.

Now, this was given to me for a report and recommendation. My oral rulings on the record will stand as that report and recommendation and the explanation for it.

Since this is a report and recommendation, the defense obviously has the right to object to that to Judge Conlon, if you wish to do so. Specific written objections to the report and recommendation may be served and filed within 10 business days from the date that the order is served. The failure to file objections with the District Court within the specified time will result in a waiver of the right to appeal the

findings that I've made, both factual and legal, in this report and recommendation.

So, again, thank you again for very good presentations, and thank you for flexibility in scheduling. I know we had to do this in a little bit of a piecemeal way, but I think that it allowed for the effective presentation of all the evidence.

THE DEFENDANT: Excuse me, your Honor. I'd like to make a statement directly to the Court, please.

THE COURT: Mr. Shabaz, let me – let me do this. You have an attorney for a reason. The reason you have an attorney is because she is experienced in the law far more than you are, far more than most laypeople would be. You are – she is there to give you advice and to make sure that the things [373] that you do in aid of your defense are constructive and not destructive.

You may think that it's a good idea to make a statement. Ms. Domph may agree with you, but then again, she may not. So, what I'm going to do is we're going to go off the record, and I'm going to direct that you talk with her about what it is you want to say to get her advice and counsel about that before you say anything that in the end may or may not be a good thing for you to say. All right?

THE DEFENDANT: I understand, your Honor. That's not necessary.

THE COURT: But I'm requiring it. I'm requiring it.

THE DEFENDANT: Okay. I'll consult with my attorney, but after that, I'd still like to make a direct statement to the Court.

THE COURT: Well, I want you to consult with your attorney and be guided by what she says.

Off the record.

(Discussion held off the record.)

THE COURT: Let's go back on the record.

Has there been an opportunity for Mr. Shabaz to consult with his counsel about his desire to make some statement?

MS. DOMPH: There has.

THE COURT: And what does Mr. Shabaz wish to do?

[374] MS. DOMPH: Mr. Shabaz wishes to speak to you.

THE COURT: All right. Now, in doing that, I just want to say one other thing, and my guess is that Ms. Domph has told you this. We are now done with the suppression hearing. I have issued my ruling. You are free to say what you want to say, but what you say can be used against you.

THE DEFENDANT: I understand that.

THE COURT: All right. You understand that fully?

THE DEFENDANT: Yes, I do.

THE COURT: All right. Whether it is wise or unwise, it is your decision. If you want to make a statement, I can't prevent you from doing that, I'm not going to walk off the bench to prevent you from doing that. And you've had a chance to talk with your attorney about it. If you wish to make a statement, go ahead.

THE DEFENDANT: Okay. First of all, I'd like to start with the – the events, obviously, on the 21st –

THE COURT: Let me say this: Are you going to go through everything that occurred?

THE DEFENDANT: No.

THE COURT: Because you testified, and I've heard your testimony, and we're not going to have a do-over of testimony.

THE DEFENDANT: I understand.

THE COURT: You understand that?

[375] THE DEFENDANT: Yes.

THE COURT: A statement is not rehashing everything that's happened.

MS. DOMPH: May I have a minute?

THE COURT: Yes.

(Discussion held off the record.)

THE DEFENDANT: May I continue?

THE COURT: I will let you speak, but I want to emphasize that if what I perceive is that you're simply rehashing the testimony, then we are going to terminate this, because that's not what we're here for.

I respect that you will disagree with what I've ruled. Anybody has the right to disagree. But, you know, it's given to me, hearing all the evidence, to make a decision. I have done that. You have a right to appeal that to Judge Conlon. If she thinks that I'm incorrect and you persuade her of that, then she'll come up with a different ruling. But I have ruled on this, and so we're not going to simply rehash all the evidence that we heard.

THE DEFENDANT: I understand.

THE COURT: All right.

THE DEFENDANT: I just wanted to start by drawing attention to the time frame. You didn't seem to put much weight on the fact that there was 15, perhaps 20 minutes, something like that, of time from the time I arrived at the [376] police station to the time the advice of rights form was presented. It's pretty much unexplained by the government's side; whereas, I did explain it.

You stated that right before or right at the beginning of the interview, I requested phone calls. That was not my testimony or any of the officers' testimony. The testimony was that the phone calls – the request for the phone calls came a little bit later.

You stated that Wentz and Watson were consistent about the introductory statement made by Watson. One officer stated that there was no introductory statement by Watson. The other officer, the advice of rights form was presented promptly, promptly followed by the consent to search warrant. Another officer stated that there was an introductory statement, then the presentation of the advice of rights, and then the presentation of the consent to search form. Another officer testified that there was an introductory statement, then the presentation of the advice of rights, then some questioning, and then the presentation of a consent to search.

Agent Watson himself contradicted himself on the stand when he first said that the advice of rights was presented and then promptly after, the consent to search form was presented. Then he turned his story around within the time frame that Ms. Domph was questioning him.

THE COURT: All right. What you are essentially [377] doing is explaining why you disagree with my ruling. I accept that you disagree with my ruling. And the matters that you point out, if you think that they are sufficiently important that they

make my ruling something that Judge Conlon should overturn or reject, then you're free to do that.

THE DEFENDANT: That's my purpose, actually.

THE COURT: Then the vehicle to do that is in something to file with Judge Conlon, and not to state to me.

THE DEFENDANT: I understand. I just feel if it's better that I put it on the record.

THE COURT: Well, it's not better if you put it on the record, because your attorney has the right to file an objection if you want to do that.

THE DEFENDANT: I understand. Can I just say one more thing and then I'll be finished?

THE COURT: Sure.

THE DEFENDANT: You stated that Watson questioned me about bomb-making material. I don't think there was any testimony by me or the agents during the hearing that Watson questioned me about bomb-making material.

THE COURT: All right. Well, I've made my ruling. I don't need to comment on what you say. My failure to comment obviously does not reflect any agreement with either the recitation of what you say or whether those were matters of significance to the ruling.

[378] All right. Thank you very much.

THE DEFENDANT: Thank you.

(Proceedings concluded.)

CERTIFICATE

I hereby certify that the foregoing is a true and correct transcript of the proceedings in the above-entitled case.

_____ _____, 2008

CHARLES R. ZANDI
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 07 CR 855
vs.	)	Chicago, Illinois
SAMUEL SHABAZ,	)	March 31, 2008
Defendant.	)	9:00 A.M.

TRANSCRIPT OF PROCEEDINGS –
Suppression Hearing
BEFORE THE
HONORABLE SIDNEY I. SCHENKIER,
MAGISTRATE JUDGE

(Filed Nov. 26, 2008)

APPEARANCES:

For the Government:

HON. PATRICK J. FITZGERALD
219 South Dearborn Street
Chicago, Illinois 60604
BY: MS. MICHELLE NASSER WEISS
MS. NATHALINA A. HUDSON

For the Defendant:

MS. ELLEN R. DOMPH
53 West Jackson Boulevard
Suite 1544
Chicago, Illinois 60604

PAMELA. S. WARREN, CSR, RPR
Official Court Reporter
219 South Dearborn Street
Room 1928
Chicago, Illinois 60604
(312) 294-8907

* * *

[38] authorities encountered Mr. Shabaz, such as how long the surveillance was, how many people were surveilling, doesn't really go to that point.

MS. DOMPH: Well, we don't know –

THE COURT: So I will allow the answer to that question, but let's move to when they actually first had contact with Mr. Shabaz.

BY MS. DOMPH:

Q. So did you say around 8:00 o'clock the arrest was initiated? Would that be a fair statement?

A. Approximately, yes.

Q. Okay. And you were one of the arresting officers, is that fair to say?

A. Sure.

Q. Who else was – actually descended on the residence to be an arresting officer?

A. Approximately ten people, including myself, Watson, Keenan, Hunt, McGuire. I do know Agent Christopher Hinden was there. Agent Lori Warren was there.

As far as the other agents, I don't recall at this moment.

Q. And I think you testified that earlier that Mr. Shabaz was – you were inside the location of his residence when you first encountered him. Is that correct?

A. I wasn't inside, no.

* * *

[98] A. Okay. I don't recall specifically.

BY MS. DOMPH:

Q. Well, about what time did you guys enter the residence, you officers?

A. I believe it was more around 7:00.

Q. You entered the residence at 7:00?

A. I believe it was – or shortly – maybe a little later, but around that time.

Q. And who entered, initially?

A. Agent – FBI agents specifically you're asking?

Q. Yes, please.

A. Chris Crocker; Lori Warren; myself, Bryan Watson; Brian Wentz, I believe entered. Oak Lawn PD Police Detectives Jim Hunt, Dennis Keenan.

I believe that was it, I believe.

Q. How many is that about?

A. That's six isn't – yeah, about six or seven.

Q. Okay. And you knocked down the door to get in the residence, is that correct?

A. That's correct.

Q. Not you specifically, but the door was knocked down.

A. Yes.

Q. There was no knock and announce, is that correct?

A. No, it was.

Q. There was a knock and announce but no response?

* * *

[123] Q. – recording.

And no court reporter was contacted to take down any alleged statements.

A. No.

Q. Now according to you Mr. Shabaz never asked for an attorney.

A. That's correct.

Q. Except you testified that you heard him use the word attorney or lawyer when you brought him in that room, is that correct?

A. No, that's not correct.

Q. You testified on direct examination today that he used the word – you heard him use the word attorney or lawyer. Do you remember that testimony?

A. Yes.

Q. Okay. And that was when you were in his presence, right?

A. Before, prior Miranda, but not inside the room.

Q. You were in his presence.

A. That's correct.

Q. Okay. .And that was right where?

A. I don't know exactly where, but I believe it was between him getting – initially coming to Cal City, the Calumet City Police Department, and going to the bathroom or could have been in the bathroom, in the cell when he was using the restroom.

Q. Well, he was speaking to you, isn't that correct?

[124] A. No. I remember just the word attorney. I don't know if he – the content exactly. I do know that he didn't ask for an attorney.

Q. You just randomly heard him say attorney, lawyer, is that what you are saying?

A. I don't know the context. I do remember him using the word attorney.

Q. Well, you didn't – it is fair to say, since you're telling the Court that you don't really know the context of it, you didn't follow up on it, right?

A. That's – yeah, actually. And when I advised him of his rights, I was clear, and he clearly understood, according – Government Exhibit Number 1, which is in the rights, you have the right to have a lawyer with you during your questioning. He understood that.

Q. That's not what I meant. I meant you didn't follow up when you said you heard this word attorney, lawyer in the bathroom area or before you got in the room, you didn't follow up with it and say, what did you say, Mr. Shabaz, or did you want an attorney, Mr. Shabaz? You didn't say anything like that.

A. No, I did not say that.

Q. In fact I think you testified you don't recall much about that conversation at all, is that fair to say?

A. What conversation?

Q. About this lawyer, attorney thing that you heard.

* * *

[148] A. None.

MS. HUDSON: I have no further questions.

THE COURT: Cross examination.

MS. DOMPH: Thank you.

CROSS EXAMINATION

BY MS. DOMPH:

Q. You were on the arrest scene, is that correct?

A. Yes.

Q. About what time did you arrive?

About what time did you arrive?

A. Where?

Q. The arrest, scene of arrest.

A. His residence?

Q. Is that where it was?

A. Yes.

Q. Yes.

About what time?

A. Approximately 8:00 A.M.

Q. And were you one of the officers that went inside Mr. Shabaz's residence?

A. Yes.

Q. Okay. And in what order do you think you entered, if you know?

A. Possibly fourth.

Q. Okay. And the door was knocked down, is that correct?

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 07 CR 855
vs.	)	Chicago, Illinois
SAMUEL SHABAZ,	)	April 1, 2008
Defendant.	)	11:25 A.M.

TRANSCRIPT OF PROCEEDINGS –
Continued Suppression Hearing
BEFORE THE
HONORABLE SIDNEY I. SCHENKIER,
MAGISTRATE JUDGE

(Filed Nov. 26, 2008)

APPEARANCES:

For the Government:

HON. PATRICK J. FITZGERALD
219 South Dearborn Street
Chicago, Illinois 60604
BY: MS. MICHELLE NASSER WEISS
MS. NATHALINA A. HUDSON

For the Defendant:

MS. ELLEN R. DOMPH
53 West Jackson Boulevard
Suite 1544
Chicago, Illinois 60604

PAMELA. S. WARREN, CSR, RPR
Official Court Reporter
219 South Dearborn Street
Room 1928
Chicago, Illinois 60604
(312) 294-8907

* * *

[191] that correct?

A. I did meet with them yesterday. I was told I was going to have to be back here today.

Q. You didn't talk about the substance of what had occurred in the four hours of testimony yesterday yesterday when you spoke to them?

A. Yes, I believe there was some conversation.

Q. And as each agent or detective came out of the courtroom yesterday, did any of them discuss with you what their testimony was?

A. No.

Q. I would just like to draw your attention now to 12-21-07, the arrest of my client Mr. Shabaz.

You were one of the officers present at the scene, is that correct?

A. That's correct.

Q. And what time did you arrive at his residence?

A. Approximately 7:30.

Q. And do you recall what time that – strike that.

And you were one of the officers that entered the residence to effectuate an arrest, is that right?

A. Yes.

Q. Do you know what time you entered the residence?

A. No.

Q. It was some time after 7:30?

[192] A. Yes.

Q. And you arrive back at Cal City a little – maybe about 8:20 or 8:30, does that sound right?

A. Approximately, yes.

Q. So it was some time between 7:30 and some time after 8:00 that you entered the premises of Mr. Shabaz.

A. Yes.

Q. And how many officers, detectives, FBI agents entered the premises?

A. I have to estimate five or six.

Q. And weapons were drawn I assume?

A. Yes.

Q. And the house was breached, broken – not – the door was knocked down?

A. Yes.

Q. And at time would it be fair to say that Mr. Shabaz was in sort of sweat clothes and had been sleeping perhaps?

A. Yes.

Q. And when did you first observe him when you got inside the premises?

A. I secured the living area, the kitchen area. Mr. Shabaz was in handcuffs being taken out of his bedroom, let out of the house. So I probably encountered him the first time outside of the front door.

Q. Would it be fair to say you were in the house a very short

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SAMUEL SHABAZ, Defendant.	)))))))	Docket No. 07 CR 855 Chicago, Illinois April 3, 2008 12:10 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS –
SUPPRESSION HEARING
BEFORE THE
HONORABLE SIDNEY I. SCHENKIER

(Filed Dec. 1, 2008)

APPEARANCES:

For the Government:

HON. PATRICK J. FITZGERALD
United States Attorney, by
MS. MICHELLE NASSER WEISS
MS. NATHALINA A. HUDSON
Assistant United States Attorneys
219 South Dearborn Street
Chicago, Illinois 60604

For the Defendant:

MS. ELLEN R. DOMPH
53 West Jackson Boulevard
Suite 1544
Chicago, Illinois 60604

ALEXANDRA ROTH, CSR, RPR
Official Court Reporter
219 South Dearborn Street
Room 1224
Chicago, Illinois 60604
(312) 294-0134

* * *

[245] A. I have to go off of what I saw my bedside alarm clock when I left. Ten-minute drive. I don't know. Maybe – I don't think it could have been much later than 8:30, 8:35.

Q. Okay. Now, what happened next, sir?

A. I asked Agent Watson because it appeared he was – I got the distinct impression he was running the questioning. So I addressed him. I said, can I get these cuffs taken off? He said no.

I said why not? They're uncomfortable. He said, it's policy.

Q. Okay.

A. So the cuffs didn't come off.

Q. What happened next?

A. Agent Watson again said, you know, why don't you just tell us what happened. We have DNA evidence, and we have pictures. He reiterated the pictures, the evidence he so-called have. To start from the beginning.

Again, I asked for an attorney.

Q. Okay. And what occurred next?

A. At one point between this – these few exchanges back and forth when I asked for an attorney, he said, we'll get to that. And then he commenced again with his questioning.

He started to get specific about, you know, why don't you start back in April. He gave me a month. Back in April I assume of that year.

* * *

No. 09-636

In the Supreme Court of the United States

SAMUEL SHABAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether *Davis* v. *United States*, 512 U.S. 452 (1994), which held that a suspect's invocation of the right to counsel must be unambiguous in order to require the police to cease questioning him, applies to initial invocations of the right as well as to invocations of the right that follow an initial waiver of that right.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Christopher K., In re, 841 N.E.2d 945 (Ill. 2005) 8
Cothren, Ex parte, 705 So. 2d 861 (Ala. 1997), cert. denied, 523 U.S. 1029 (1998) 8
Davis v. *United States*, 512 U.S. 452 (1994) 5, 6, 7, 10
Edwards v. *Arizona*, 451 U.S. 477 (1981) 6
Grant-Chase v. *Commissioner, N.H. Dep't of Corr.*, 145 F.3d 431 (1st Cir.), cert. denied, 525 U.S. 941 (1998) 8
Michigan v. *Mosley*, 423 U.S. 96 (1975) 7
Miranda v. *Arizona*, 384 U.S. 436 (1966) 2, 6, 11
Montejo v. *Louisiana*, 129 S. Ct. 2079 (2009) 9
Moore v. *State*, 903 S.W.2d 154 (Ark. 1995) 8
Monroe v. *State*, 126 P.3d 97 (Wyo. 2006) 8
People v. *Crittenden*, 885 P.2d 887 (Cal. 1994), cert. denied, 516 U.S. 849 (1995) 8
Smith v. *Illinois*, 469 U.S. 91 (1984) 10
State v. *Holloway*, 760 A.2d 223 (Me. 2000) 8
State v. *Leyva*, 951 P.2d 738 (Utah 1997) 8
State v. *Morris*, 880 P.2d 1244 (Kan. 1994) 8
State v. *Tuttle*, 650 N.W.2d 20 (S.D. 2002) 8

Cases—Continued: Page

State v. *Williams*, 535 N.W.2d 277 (Minn. 1995) 8
United States v. *Brown*, 287 F.3d 965 (10th Cir. 2002) 8
United States v. *Hurst*, 228 F.3d 751 (6th Cir. 2000) 8
United States v. *Johnson*, 400 F.3d 187 (4th Cir.), cert. denied, 546 U.S. 856 (2005) 7
United States v. *Lee*, 413 F.3d 622 (7th Cir. 2005) 7
United States v. *Plugh*, 576 F.3d 135 (2d Cir. 2009) 8
United States v. *Posada-Rios*, 158 F.3d 832 (5th Cir. 1998), cert. denied, 526 U.S. 1031, 526 U.S. 1080, and 526 U.S. 1137 (1999) 8
United States v. *Rodriguez*, 518 F.3d 1072 (9th Cir. 2008) 8
United States v. *Suarez*, 263 F.3d 468 (6th Cir. 2001), cert. denied, 535 U.S. 991 (2002) 8
United States v. *Syslo*, 303 F.3d 860 (8th Cir. 2002) 8

Constitution and statute:

U.S. Const. Amend. V 7, 10
18 U.S.C. 2113(a) 1, 2

In the Supreme Court of the United States

No. 09-636

SAMUEL SHABAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 579 F.3d 815.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2009. The petition for a writ of certiorari was filed on November 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional plea of guilty in the United States District Court for the Northern District of Illinois, petitioner was convicted of bank robbery (Counts 1 and 2), and attempted bank robbery (Count 3), all in violation of 18 U.S.C. 2113(a). He was sentenced to 188 months of imprisonment, to be followed by three years

of supervised release. The court of appeals affirmed. Pet. App. 1-11.

1. On December 21, 2007, agents of the Federal Bureau of Investigation (FBI) arrested petitioner at his home in Chicago, Illinois. The agents acted under the authority of an arrest warrant naming petitioner as a suspect in a robbery at a TCF Bank located in Oak Lawn, Illinois. FBI agents and Oak Lawn Police Department officers took petitioner to the Calumet City Police Department, where petitioner confessed to twice robbing the TCF Bank and also attempting to rob the Stanford Bank and Trust in Oak Lawn. Petitioner provided many details about the planning and execution of the robberies, his motive, and the disposition of the robbery proceeds. He also identified himself in bank surveillance photographs and signed them to acknowledge that he was the person depicted in them. Pet. App. 1-2, 4.

2. Petitioner was indicted on one count of attempted bank robbery and two counts of bank robbery, all in violation of 18 U.S.C. 2113(a). Pet. App. 1-2. He moved to suppress his confession on the ground that it was taken in violation of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), because the agents questioned him after he had requested counsel and because he did not validly waive his *Miranda* rights. Mot. to Suppress 1-3.

At the suppression hearing, petitioner and the government presented significantly different versions of the events surrounding petitioner's confession. FBI Agent Brian Watson testified that before petitioner was taken into the interview room, he was permitted to use the bathroom. Thereafter, Agent Watson heard petitioner use the word "attorney" or "lawyer," but did not remember the context in which the word was used. Agent Wat-

son testified, however, that he was sure petitioner did not request an attorney. Once inside the interview room, Agent Watson identified those present, explained to petitioner why he had been arrested, and outlined the topics the FBI wished to discuss with him. Agent Watson read petitioner his *Miranda* rights and asked him to sign an "advice of rights" waiver form. Petitioner stated that he understood his rights, but did not want to sign the form. Petitioner said that he would continue to speak to the FBI but would stop any time he did not want to answer a question. Agent Watson further testified that the agents did not promise petitioner leniency in return for his statement. Pet. App. 2-3.

Petitioner testified that, after arriving at the police station and using the restroom, he asked Agent Watson, "[A]m I going to be able to get an attorney?" and Agent Watson replied, "[L]et's just get you down here," pointing to the interview room. Petitioner further testified that, as he entered the interview room, Agent Watson told him that "[W]e know what you've been doing," and asked petitioner to "start at the beginning." Petitioner testified that he asked for a lawyer several times but was ignored. He also testified that at some point he asked to call his girlfriend and a friend, but that the officers refused to allow him to do so until he agreed to cooperate. Petitioner also testified that the officers promised him leniency if he cooperated. Pet. App. 3.

3. The magistrate judge who conducted the hearing recommended that the suppression motion be denied. Pet. App. 33-53. The magistrate judge credited petitioner's testimony that, before entering the interview room, he had asked Agent Watson, "[A]m I going to be able to get an attorney?" *Id.* at 5, 39-40. The magistrate judge determined that Agent Watson did not answer

that question, but instead deferred responding until the police had petitioner in the interrogation room and could advise him of his rights. *Id.* at 5, 40. The magistrate judge rejected petitioner's account of what had occurred inside the interview room, crediting instead the account given by the government witnesses. *Id.* at 5, 47. Finally, the magistrate judge found that petitioner had knowingly and voluntarily waived his *Miranda* rights once he was in the interview room. *Id.* at 5, 47-49. The magistrate judge noted that petitioner "testified that he had a good understanding of what his rights were" because he "had been presented with [an advice of rights] form in connection with an earlier criminal matter." *Id.* at 46.

The district court adopted the magistrate's report and recommendation and denied the motion to suppress. Pet. App. 12-30. The court reviewed the record and found "no reason to set aside the magistrate judge's credibility determination and findings." *Id.* at 23. As relevant here, the court determined that petitioner was not questioned in violation of *Miranda* after requesting a lawyer, *id.* at 24-26, and knowingly, intelligently, and voluntarily waived his rights when he decided to speak with the police, *id.* at 20-24.

Petitioner then entered into a conditional plea of guilty to all three charges. Pet. App. 2; Judgment 1. He was sentenced to 188 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

4. The court of appeals affirmed. Pet. App. 1-11. First, the court rejected petitioner's claim that his question—"[A]m I going to be able to get an attorney?"—amounted to an unambiguous invocation of his *Miranda* rights so as to preclude police questioning. *Id.* at 6-9.

The court explained that, under *Davis* v. *United States*, 512 U.S. 452, 459 (1994), police officers need not cut off questioning unless a suspect makes an unambiguous request for counsel. Pet. App. 6. The court "agree[d] with the district court that [petitioner's] question was not a clear request for counsel under the circumstances." *Id.* at 7. The court explained that the question itself did "not clearly imply a present desire to consult with counsel" and that the circumstances in which the question was asked support the conclusion that petitioner did not unambiguously request counsel. *Id.* at 8-9 (internal quotation marks omitted). The court noted that as soon as petitioner was led into the interview room, he was advised of his *Miranda* rights, and although he could easily have requested an attorney at that point, he chose to talk to the officers and "never followed up on his initial question in the hall." *Id.* at 9. The court concluded that "[u]nder those circumstances, the officers were under no obligation to stop questioning [petitioner]." *Ibid.*

The court of appeals then rejected petitioner's other claim, which was that he did not validly waive his *Miranda* rights. Pet. App. 9-11. The court adopted the factual findings and credibility determinations of the magistrate judge and concluded that, under the totality of the circumstances, petitioner had knowingly and voluntarily waived his rights. *Id.* at 10-11.

ARGUMENT

Petitioner contends (Pet. 4-16) that this case presents the question whether the rule announced in *Davis* v. *United States*, 512 U.S. 452 (1994)—that a suspect's invocation of the right to counsel must be unambiguous to trigger the requirement that the police cease ques-

tioning him—applies to both post-waiver invocations of the right to counsel (the facts in *Davis*) and to initial invocations of that right (the facts in this case). Petitioner did not, however, raise that issue before either the district court or the court of appeals. As a consequence, the court below did not address it. This Court should not review the question in the first instance. In any event, the court below correctly applied *Davis* and determined that, under the circumstances here, petitioner did not unambiguously invoke his right to counsel.

1. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court held that, in order to "dispel the compulsion inherent in custodial" interrogation, certain warnings must be given "at the outset of the interrogation." *Id.* at 457-458. Those warnings advise the suspect that he has the right to remain silent, that any statements he makes can be used against him in court, that he has the right to consult with counsel, and that if he cannot afford an attorney, one will be provided for him prior to questioning. *Id.* at 479. A suspect who receives these warnings may then choose to waive or invoke his rights. If the suspect invokes his right to counsel, the police must cease questioning him until counsel has been made available to him, unless he initiates further contact with the police. *Edwards* v. *Arizona*, 451 U.S. 477, 484-485 (1981); see also *Maryland* v. *Shatzer*, No. 08-680 (argued Oct. 5, 2009) (considering possible circumstances in which *Edwards* protection lapses).

In *Davis* v. *United States*, the Court addressed what a suspect must do to invoke the right to counsel. There, the police provided the suspect with *Miranda* warnings, he initially waived his rights to silence and to counsel, and one and one-half hours later, he said, "Maybe I should talk to a lawyer." 512 U.S. at 454-455. The Court

concluded that the statement was insufficient to invoke the right to counsel. *Id.* at 458, 462. The Court held that, in order to invoke his right to counsel, a suspect must "unambiguously" request counsel—that is, "he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* at 459. If a suspect makes a statement "that is ambiguous or equivocal," the police are not required to cease questioning him. *Ibid.* Nor are the police required to ask questions to clarify an ambiguous reference to counsel, although it will often be "good police practice" to do so. *Id.* at 461-462.

An "objective inquiry" is required, the Court explained, to "avoid difficulties of proof and to provide guidance to officers conducting investigations." *Davis*, 512 U.S. at 458-459. And, the Court determined, an unambiguous invocation standard best balances the Fifth Amendment interest in protecting against official compulsion and society's interest in uncovering and prosecuting criminal activity. *Id.* at 459-460. A rule that would require police officers to cease questioning a suspect when they "do not know whether or not the suspect wants a lawyer * * * 'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.'" *Id.* at 460 (quoting *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975)).

2. Although *Davis* addressed the factual situation of a suspect who initially waived his *Miranda* rights and then attempted to invoke them, the majority of courts of appeals have applied the *Davis* standard to both initial and post-waiver invocations of *Miranda* rights. See *United States* v. *Lee*, 413 F.3d 622, 626 (7th Cir. 2005); *United States* v. *Johnson*, 400 F.3d 187, 194-195 (4th

Cir.), cert. denied, 546 U.S. 856 (2005); *United States* v. *Syslo*, 303 F.3d 860, 866 (8th Cir. 2002) (per curiam); *United States* v. *Brown*, 287 F.3d 965, 972-973 (10th Cir. 2002); *United States* v. *Suarez*, 263 F.3d 468, 482-483 (6th Cir. 2001), cert. denied, 535 U.S. 991 (2002); *United States* v. *Hurst*, 228 F.3d 751, 759-760 (6th Cir. 2000); *United States* v. *Posada-Rios*, 158 F.3d 832, 867 (5th Cir. 1998), cert. denied, 526 U.S. 1031, 526 U.S. 1080, and 526 U.S. 1137 (1999); *Grant-Chase* v. *Commissioner, N.H. Dep't of Corr.*, 145 F.3d 431, 436 & n.5 (1st Cir.), cert. denied, 525 U.S. 941 (1998).

The Second and Ninth Circuits, on the other hand, have limited the *Davis* rule to post-waiver invocations. See *United States* v. *Plugh*, 576 F.3d 135, 142-143 (2d Cir. 2009); *United States* v. *Rodriguez*, 518 F.3d 1072, 1077-1080 (9th Cir. 2008). Those circuits have held that if a suspect's initial invocation of the right to counsel is ambiguous, officers are limited to asking questions aimed at clarifying the suspect's wishes concerning his *Miranda* rights. *Plugh*, 576 F.3d at 139 & n.4, 144; *Rodriguez*, 518 F.3d at 1079-1080.[1]

---

[1] Similarly, some state courts of last resort have disagreed on whether the *Davis* requirement of an unambiguous invocation applies to an initial invocation of *Miranda* rights, as opposed to a post-waiver invocation. Compare, *e.g.*, *State* v. *Tuttle*, 650 N.W.2d 20, 28 (S.D. 2002) (declining to apply *Davis* standard to initial invocation); *State* v. *Holloway*, 760 A.2d 223, 228 (Me. 2000) (same); *State* v. *Leyva*, 951 P.2d 738, 743 (Utah 1997) (same), with, *e.g.*, *Monroe* v. *State*, 126 P.3d 97, 101 (Wyo. 2006) (applying *Davis* standard to initial invocation); *In re Christopher K.*, 841 N.E.2d 945, 964-965 (Ill. 2005) (holding that *Davis* standard applies to initial invocation); *Ex parte Cothren*, 705 So. 2d 861, 862-867 (Ala. 1997) (applying *Davis* standard to initial invocation), cert. denied, 523 U.S. 1029 (1998); *State* v. *Williams*, 535 N.W.2d 277, 285 (Minn. 1995) (same); *Moore* v. *State*, 903 S.W.2d 154, 157-158 (Ark. 1995) (same); *People* v. *Crittenden*, 885 P.2d 887, 912-913 (Cal. 1994) (same),

Despite the disagreement among the circuits on whether the *Davis* rule applies to an initial invocation of *Miranda* rights, review is unwarranted in this case. First, petitioner did not present this question to the district court or the court of appeals, and neither court addressed it. Rather, petitioner simply argued that his question, "[A]m I going to be able to get an attorney?" constituted an unambiguous request for counsel that precluded any questioning. See Pet. C.A. Br. 2-4; Pet. Objections to Magistrate's Report 9-11. Petitioner never suggested that the standard for invocation of *Miranda* rights differed based on whether the suspect already had waived his rights. He did not even mention *Davis* in the court of appeals until his reply brief, and he never cited *Plugh*, *Rodriguez*, or any other of the cases he now cites that address whether *Davis* applies to initial invocations of *Miranda* rights. In view of petitioner's failure to raise the issue, and the court of appeals' failure to discuss it, this Court's review is not warranted. See, *e.g.*, *Montejo* v. *Louisiana*, 129 S. Ct. 2079, 2092 (2009) ("[W]e are a court of final review, not of first view.") (internal quotation marks omitted).

Second, petitioner would be entitled to no relief even in the circuits that have limited *Davis* to post-waiver invocations. In those circuits, when a suspect has made an ambiguous or equivocal request for counsel, any questioning is limited to clarifying the suspect's wishes. See p. 8, *supra*. Here, following petitioner's statement "[A]m I going to be able to get an attorney?"—which the courts below construed as an ambiguous request—the officers did not pose substantive questions to petitioner

---

cert. denied, 516 U.S. 849 (1995); *State* v. *Morris*, 880 P.2d 1244, 1253 (Kan. 1994) (same).

concerning his involvement in the bank robbery until after petitioner had made clear his wishes concerning his Fifth Amendment rights. After entering the interrogation room, the officers explained to petitioner why he had been arrested and outlined the topics they wished to discuss with them. Pet. App. 2. They then advised him of his *Miranda* rights and asked him to sign an "advice of rights" form. Petitioner stated that he understood his rights, and, while he refused to sign the form, he said that he would continue to speak to the agents but would stop any time he felt he did not want to answer a question. *Id.* at 2-3. Only then did the agents commence questioning him about the robbery. *Id.* at 3.

Third, the court of appeals' application of *Davis* to initial invocations of the right to counsel is correct. *Davis* does not support a distinction between a defendant who initially waived his *Miranda* rights and then reconsidered (the facts in *Davis*) and a suspect who is considering in the first instance whether to invoke his rights following warnings (the facts in this case). *Davis* states a general rule: a request for counsel must be unambiguous, so that a reasonable police officer can recognize it as an invocation of *Miranda* rights and respect the suspect's wishes. *Davis*, 512 U.S. at 459. That reasoning applies equally to both initial and post-waiver invocations of *Miranda* rights. Presuming that the suspect has requested counsel when he has made an ambiguous invocation—whether it is an initial invocation or a post-waiver invocation—would "needlessly prevent the police from questioning a suspect * * * even if the suspect did not wish to" exercise his rights. *Id.* at 460.

The magistrate judge, district court, and court of appeals all concluded that, on the facts of this case, petitioner did not evidence a clear desire to have the assis-

tance of counsel. Pet. App. 7. That conclusion is correct: Petitioner's question does not indicate that he wished the assistance of counsel during questioning, and the surrounding circumstances make clear that petitioner was willing to speak to the police without a lawyer.[2]

3. Petitioner contends in passing (Pet. 12-13) that the court of appeals erred in concluding that he validly waived his *Miranda* rights. But as petitioner notes, "[i]nvocation and waiver [of *Miranda* rights] are entirely distinct inquiries," Pet. 8 (brackets in original) (quoting *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (per curiam)); see Pet. 11, 13, and he does not present any separate question in his petition regarding waiver, Pet. i. In any event, the court of appeals correctly determined that petitioner knowingly, intelligently, and voluntarily waived his rights. Pet. App. 9-11. After receiving *Miranda* warnings, petitioner stated that he under-

---

[2] Petitioner argues (Pet. 11) that his statement "Am I going to be able to get an attorney?" "satisfie[d] *Miranda*'s standard for indicating 'in any manner' that he preferred to remain silent." While the *Miranda* Court stated that questioning must cease "[i]f the individual indicates in any manner * * * that he wishes to remain silent" (384 U.S. at 473-474) or "to consult with any attorney before speaking" (*id.* at 444-445), it did not purport to address how to interpret an ambiguous statement about either counsel or silence. The point of that passage was that a suspect need not use particular words to invoke his right to counsel (*id.* at 444-445, 473-474) or to remain silent (*id.* at 473); he may do so "in any manner." *Id.* at 444-445, 473-474. The Court did not address the level of clarity required in the suspect's statement. The decision below therefore does not conflict with this Court's decision in *Miranda*.

Petitioner also contends (Pet. 5) that the decision below is "contrary to this Court's holding in *Davis*," but he is mistaken, because *Davis* did not address the factual situation of an initial invocation of the right to counsel, 512 U.S. at 454-455; see Pet. 5 n.2, and because the court of appeals applied the same rule as in *Davis*, Pet. App. 6.

stood his rights and immediately agreed to talk with the police. *Id.* at 10. His interview lasted approximately one hour, and he was not deprived of any necessities or coerced in any manner. *Id.* at 10-11, 22-23.

Petitioner also suggests (Pet. 8-9) that requiring that a suspect's initial invocation of his right to counsel be unambiguous improperly relieves the government of its heavy burden of establishing that the suspect waived his *Miranda* rights, and instead shifts to the suspect the burden of establishing the lack of such a waiver. But that argument confuses the question whether a suspect has invoked his *Miranda* rights with the question whether he waived those rights. Whether or not a suspect has clearly invoked his right to counsel determines whether there may be further questioning of the suspect. But even if a suspect has not clearly invoked his right to counsel so as to preclude further questioning, the burden remains on the government to establish a knowing, intelligent, and voluntary waiver of the suspect's right to counsel. The court of appeals recognized that "the Government bears the burden of proving that [petitioner's] statement was made following a knowing, voluntary, and intelligent waiver," and it correctly determined that the government had met its burden. Pet. App. 10-11.

4. There is no need to hold this case pending the Court's decision in *Berghuis* v. *Thompkins*, cert. granted, No. 08-1470 (oral argument scheduled for Mar. 1, 2010). That case presents issues concerning the application of *Miranda*, including whether a suspect must unambiguously invoke the right to remain silent in order to preclude police questioning; whether the police may question a suspect who has been informed of his *Miranda* rights, has stated that he understood his rights,

and has not invoked or waived those rights; and whether a suspect who is aware of his rights waives them when he knowingly, intelligently, and voluntarily responds to police questioning. In its amicus brief, the government has argued that the *Davis* standard should apply to both initial and post-waiver invocations of the right to silence. U.S. Amicus Br. at 13-19, *Thompkins*, *supra* (No. 08-1470).

Although the Court in *Thompkins* may address related issues to the question petitioner presents, this case should not be held pending the outcome in *Thompkins*, because petitioner failed to preserve any argument regarding application of the *Davis* standard to initial invocations of *Miranda* rights, see p. 9, *supra*, and because petitioner made at most an ambiguous request for counsel and the police did not obtain any substantive statements until advising him of his *Miranda* rights and obtaining a waiver, see *id.* at 9-10. Further review therefore is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
DEBORAH WATSON
Attorney

FEBRUARY 2010

SUPREME COURT, U.S.
FILED
FEB - 9 2010

No. 09-636

In The Supreme Court of the United States

SAMUEL SHABAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

LISA L. THARPE
Counsel of Record
FOLEY & LARDNER LLP
321 North Clark Street,
Suite 2800
Chicago, Illinois 60654-5313
(312) 832-4500

ROBERT C. LEVENTHAL
FOLEY & LARDNER LLP
555 South Flower Street,
Suite 3500
Los Angeles, California
90071-2411
(213) 972-4500
(213) 486-0065

Counsel for Petitioner
Samuel Shabaz

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. Mr. Shabaz Did Not Waive on Appeal the Issue of Whether his Invocation of Counsel Was Unambiguous 1

II. The Officers Failed to Clarify Mr. Shabaz's Request for Counsel, as Required in the Second and Ninth Circuits 3

TABLE OF AUTHORITIES

Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 313 (1975) 5

Miranda v. State of Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 5

United States v. Plugh, 576 F.3d 135 (2nd Cir. 2009) 4

PETITIONER'S REPLY BRIEF

This case involves an important question of federal law that should be settled by this Court. Respondent's Brief in Opposition confirms that there is a split among the circuit courts, with the Second and Ninth Circuits holding that *Davis* applies only in post-waiver settings, and the Third, Fourth, Fifth, Sixth, and Tenth Circuits applying *Davis* in pre- and post-waiver settings. Importantly, Respondent does not deny that only the Second and Ninth Circuits have examined the issue of whether *Davis* applies in both settings. Instead, Respondent relies heavily on the argument that the Court should simply reject the Petition outright because Mr. Shabaz did not preserve this particular issue for appeal. Respondent also argues, among other things, that Mr. Shabaz would not be entitled to relief even in the Second and Ninth Circuits where *Davis* is applied only in post-waiver settings.

I. Mr. Shabaz Did Not Waive on Appeal the Issue of Whether his Invocation of Counsel Was Unambiguous.

The issue of whether Mr. Shabaz unambiguously invoked the right to counsel was not raised on appeal to the Seventh Circuit because there was no finding by the District Court that his invocation was ambiguous or in any way unclear. On the contrary, the District Court adopted the findings of the Magistrate Judge that Mr. Shabaz had requested an attorney with the following words: "am I going to be

able to get a lawyer?" (Pet. App. 18, 25) At no time did the Magistrate Judge or the District Court suggest that these words were ambiguous or otherwise insufficient to invoke Mr. Shabaz's right to counsel. Instead, the District Court found that FBI Agent Watson responded to Mr. Shabaz's request for counsel by directing him to the interview room, thereby "deferring" his right to counsel, but not denying it. (Pet. App. 18, 25) Thus, the issue before the District Court was not whether Mr. Shabaz had invoked his right to counsel, but whether he later knowingly had waived his *Miranda* rights. (App. 20)

The issues raised on appeal were whether the District Court erred in denying Mr. Shabaz's motion to suppress because (1) the agents wrongfully ignored his request for counsel and (2) Mr. Shabaz did not knowingly and voluntarily waive his *Miranda* rights. (Pet. App. 5) Again, there was no question that Mr. Shabaz's request for an attorney was unambiguous. Rather, it was the Seventh Circuit that re-framed the "key issue in this case" as "whether Shabaz clearly invoked his right to counsel." (Pet. App. 6) The Seventh Circuit ultimately held that Mr. Shabaz's request for counsel was not sufficiently unambiguous to invoke his right to counsel.[1] (Pet. App. 8-9)

---

[1] Indeed, the Seventh Circuit's framing of the issue appears to contradict the District Court's holding that there was a valid request for counsel which was "deferred." (Pet. App. 18, 20)

Therefore, Mr. Shabaz did not fail to preserve for appeal the issue of whether the *Davis* ambiguity rule should apply to pre- and post-waiver settings because the issue of whether Mr. Shabaz's request for counsel was unambiguous did not arise until the Seventh Circuit's decision. Mr. Shabaz raised the issue at his earliest opportunity, in his Petition to this Court.

II. The Officers Failed to Clarify Mr. Shabaz's Request for Counsel, as Required in the Second and Ninth Circuits.

Respondent also argues that, even in the Second and Ninth Circuits, Mr. Shabaz would not have been entitled to suppression of his inculpatory statements because the officers were permitted to clarify Mr. Shabaz's "ambiguous" request. In making this argument, Respondent incorrectly cites the rulings of the courts below as finding that Mr. Shabaz's statement, "Am I going to be able to get an attorney?" was ambiguous. On the contrary, as discussed at length above, the District Court did not find Mr. Shabaz's statement to be ambiguous.

Respondent also argues that the officers here were only attempting to clarify Mr. Shabaz's request for counsel, as permitted in the Second and Ninth Circuits. While Respondent correctly states the rule in the Second and Ninth Circuits that the officers may ask questions to clarify whether the suspect in fact wishes to invoke his right to counsel, the officers must limit themselves to "narrow questions only for

the purpose of clarifying the ambiguity." *United States v. Plugh*, 576 F.3d 135, 144 (2nd Cir. 2009). Here, the officers made no effort to constrain themselves to "clarifying the ambiguity." Indeed, as Respondent acknowledges in great oversimplification, following Mr. Shabaz's request for counsel, the officers "explained to petitioner why he had been arrested and outlined the topics they wished to discuss with him." (Opposition Brief at 10) In actuality, the officers ignored his request, took him into an interview room where he was handcuffed, told Mr. Shabaz why he was under arrest, and told him, "We know it's you." (Pet. App. 43-44) Even Respondent's simplified rendition demonstrates that the officer's statements have nothing to do with clarifying whether Mr. Shabaz had requested counsel.

Indeed, in the Magistrate Judge's Report and Recommendation, which was adopted in full by the District Court, he took the officers to task for making no attempt to clarify Mr. Shabaz's request. While the Magistrate Judge credited Mr. Shabaz's testimony that he stated, "Am I going to be able to get an attorney?" the Magistrate Judge found the officers' conduct to be wholly inadequate even if, according to Agent Watson, Mr. Shabaz had merely made a vague reference to "attorney" or "counselor" without more:

> Now, under Agent Watson's rendition of this, I'm troubled by the proposition that when a defendant in custody, which Mr. Shabaz plainly was, pursuant to an arrest warrant that had been issued, when an agent has a

> person in custody and the person makes reference to an attorney or counsel, that there is apparently a *lack of curiosity or interest in knowing what the defendant is referring to and finding out whether that is a request for counsel.*
>
> ***
>
> That is not conduct that is, in my judgment appropriate for officers or agents to – to do when they have a person in custody and they make reference to an attorney or counsel.

(Pet. App. 39-40) (emphasis supplied).

Respondent's casual suggestion that "surrounding circumstances" make it "clear" that Mr. Shabaz was willing to speak to the police without a lawyer cannot erase the officers' utter failure to clarify Mr. Shabaz's request, which should have been "scrupulously honored." *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S. Ct. 321, 46 L. Ed. 313 (1975). As first stated in *Miranda*, "a valid waiver will not be presumed . . . simply from the fact that a confession was in fact eventually obtained." *Miranda v. State of Arizona*, 384 U.S. 436, 475, 86 S. Ct. 1602, 1629, 16 L. Ed. 2d 694 (1966).

CONCLUSION

Mr. Shabaz respectfully requests that this Honorable Court grant the writ of certiorari.

DATED THIS 10TH DAY OF FEBRUARY, 2010.

Respectfully submitted,

LISA L. THARPE
Counsel of Record
FOLEY & LARDNER LLP
321 North Clark Street,
Suite 2800
Chicago, Illinois 60654-5313
(312) 832-4500

ROBERT C. LEVENTHAL
FOLEY & LARDNER LLP
555 South Flower Street,
Suite 3500
Los Angeles, California
90071-2411
(213) 972-4500
(213) 486-0065

Counsel for Petitioner
Samuel Shabaz